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FCC Record

A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

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Before the
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Washington, D.C. 20554

MM Docket No. 92-56

In the Matter of

Amendment of Section 73.202(b), RM-7551
Table of Allotments,
FM Broadcast Stations.
(Bay City and Edna, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1992; Released: June 29, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the *Notice of Proposed Rule Making* in this proceeding proposing the substitution of Channel 269C1 for Channel 241C2 at Bay City, Texas, and the modification of the construction permit of Station KXGJ, Bay City, Texas, to specify operation on Channel 269C1. 7 FCC Rcd 2106 (1992). In order to accommodate this upgrade, the *Notice* also proposed the substitution of Channel 241A for vacant but applied for Channel 269A at Edna, Texas. In response to the *Notice*, Ammerman Enterprises, Inc. ("Ammerman") and Roy E. Henderson filed comments. Ammerman filed reply comments. For the reasons discussed below, we are upgrading Station KXGJ to specify operation on Channel 269C1, and are substituting Channel 241A for Channel 269A at Edna, Texas.

2. This proceeding began with the filing of a petition for rule making by Ammerman, permittee of Station KXGJ, Bay City, Texas, proposing the substitution of Channel 241C1 for Channel 241C2 at Bay City, and the modification of its construction permit to specify operation on Channel 241C1. In the *Notice*, we referred to the fact that we are considering in MM Docket No. 89-459 a proposed substitution of Channel 269C2 for Channel 241C2 at Bay City in order to accommodate a resolution of that proceeding involving proposed channel substitutions at Edna and Giddings, Texas. Instead of modifying the Station KXGJ construction permit to Channel 269C2 in a separate proceeding and then proposing a co-channel Channel 269C1 upgrade in this proceeding, the *Notice* proposed a Channel 269C1 upgrade in this proceeding as a one-step process. Ammerman filed comments and reply comments supporting this proposal. In his comments, Henderson notes that in MM Docket No. 90-90, he filed a counterproposal involving multiple channel substitutions looking toward a Channel 285C1 upgrade for his Station KMIA in Rosenberg, Texas. Included among the channel substitutions are the substitution of Channel 241A for Channel 269A at Edna, and the substitution of Channel 269C2 for Channel 241C2 at Bay City. In this regard, Henderson contends that this aspect of his counterproposal in MM Docket No. 90-90, should have been referenced in the *Notice*, and that MM Docket No. 90-90 should be resolved either prior to or in conjunction with the *Report and Order* in this proceeding.

3. We believe that the public interest would be served by upgrading Station KXGJ to specify operation on Channel 269C1.[1] In order to accommodate this upgrade, we are also substituting Channel 241A for Channel 269A at Edna, Texas.[2] In regard to the Henderson comments, we reject any contention that we should delay action in this proceeding pending the resolution of MM Docket No. 90-90. Resolving this proceeding enables us to conclude an earlier proceeding in MM Docket No. 89-459. We are aware that Henderson advanced a counterproposal in MM Docket No. 90-90 involving a Channel 269C2 substitution at Bay City and a Channel 241A substitution at Edna. Our action in this proceeding does not prejudice the Henderson counterproposal in MM Docket No. 90-90 in any manner. We also note that Henderson's counterproposal has no decisional significance in this proceeding.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the communities listed below, to read as follows:

City	Channel No.
Bay City, Texas	269C1, 273C1
Edna, Texas	241A

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Ammerman Enterprises, Inc. for Station KXGJ, Bay City, Texas, IS MODIFIED to specify operation on Channel 269C1 in lieu of Channel 241C2, subject to the following conditions:

(a) Within 90 days of this *Order*, the permittee shall submit to the Commission a minor change application for construction permit (FCC Form 301) specifying the new facilities.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620 of the Commission's Rules.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact assessment pursuant to Section 1.1307 of the Commission's Rules.

[1] The reference coordinates for the Channel 269C1 allotment at Bay City, Texas, are 28-45-58 and 96-04-11.

[2] The reference coordinates for the Channel 241A allotment at Edna, Texas, are 28-58-42 and 96-38-48. Robert M. Mason, applicant for the Channel 269A allotment at Edna (File No. BPH-890111MF), will be permitted to amend his application to specify Channel 241A without loss of cut-off protection.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or upgrade of an existing FM allotment, **if the request is granted,** must submit a rule making fee when filing its application to implement the change of community of license and/or upgrade. As a result of this proceeding, Ammerman Enterprises, Inc., permittee of Station KXGJ, is required to submit a rule making fee in addition to the required fee for the application to effect the change in community of license and/or upgrade.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission shall send a copy of this *Report and Order* BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to Robert M. Mason, 1943 Greenview, Northbrook, Illinois, 60061.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-469

In the Matter of

Amendment of Section 73.202(b),	RM-6815
Table of Allotments,	RM-7513
FM Broadcast Stations.	
(Naples Park, Solana and	
Cypress Lake, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1992; Released: June 29, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the *Notice of Proposed Rule Making and Order to Show Cause* in this proceeding proposing the substitution of Channel 288C3 for Channel 288A at Naples Park, Florida, and the modification of the license of Station WIXI, Channel 288A, Naples Park, Florida, to specify operation on Channel 288C3. 4 FCC Rcd 7827 (1989). In order to accommodate this upgrade proposal, it was also necessary to include the *Order to Show Cause* directed against the permittee of Station WMMY, Channel 287A, Solana, Florida, to show cause why its construction permit should not be modified to specify operation on Channel 285A.[2] West Florida Media, Inc., Edens Broadcasting, Inc., Wodlinger Broadcasting of Naples, Inc. and FW Communications, Inc. filed comments. West Florida Media, Inc., Edens Broadcasting, Inc. and Wodlinger Broadcasting of Naples, Inc. filed reply comments.[3] For the reasons discussed below, we are upgrading Station WIXI to specify operation on Channel 288C3, and we are modifying the construction permit of Station WMMY to specify operation on Channel 285A.

BACKGROUND

2. This proceeding began with the filing of a petition for rule making by Wodlinger Broadcasting of Naples, Inc. ("Wodlinger"), licensee of Station WIXI, Channel 288A, Naples Park, Florida, proposing the substitution of Channel 288C3 for Channel 288A at Naples Park, and modification of the Station WIXI license to specify operation on Channel 288C3. To accommodate this upgrade, Wodlinger also proposed the substitution of Channel 285A for Channel 287A at Solana, Florida, and modification of the construction permit for Station WMMY, Channel 287A, Solana, Florida, to specify operation on Channel 285A. In response to the *Notice of Proposed Rule Making and Order to Show Cause*, we received two counterproposals. In addition to indicating no objection to an upgrade for Station WIXI, West Florida Media, Inc. ("West Florida"), permittee of Station WMMY, filed a counterproposal proposing the substitution of Channel 285C3 for Channel 287A at Solana, and modification of its Station WMMY construction permit to specify operation on Channel 285C3. FW Communications, Inc. filed a counterproposal proposing the allotment of Channel 285A to Cypress Lake, Florida, as a first local service.

3. Edens Broadcasting, Inc. filed comments and reply comments. Edens Broadcasting is the licensee of Station WRBQ-FM, Channel 284C, Tampa, Florida. In its comments, Edens Broadcasting notes that it has filed an application (File No. BPH-830714AT) proposing minimum Class C facilities in order to maintain Class C status at Station WRBQ-FM.[4] The proposed Channel 285A and Channel 285C3 substitutions at Solana, and the proposed Channel 285A allotment at Cypress Lake conflict with this application.

DISCUSSION

4. On October 3, 1990, FW Communications, Inc. filed a "Withdrawal of Comments and Counterproposal" requesting that its counterproposal for a Channel 285A allotment at Cypress Lake be withdrawn. Accordingly, this counterproposal will be dismissed without further consideration.[5]

5. We deny the counterproposal advanced by West Florida proposing the Channel 285C3 upgrade at Solana, Florida. A Channel 285C3 allotment at Solana requires a site

[1] The community of Cypress Lake has been added to the caption.

[2] The *Order to Show Cause* inadvertently identified Wayne L. Dilucente as permittee of Station WMMY, and listed his address as 6775 South A1A, Floridana Beach, Florida 32951. In fact, on April 13, 1989, an Administrative Law Judge released a *Memorandum Opinion and Order* accepting an amendment by Wayne L. Dilucente to his pending application for the Channel 287A allotment at Solana to specify West Florida Media, Inc. as the applicant. This *Memorandum Opinion and Order* also granted the application. Wayne L. Dilucente holds a 50% interest in this corporation. West Florida Media, Inc. filed a "Notice" in this proceeding stating this fact and providing the new address as West Florida Media, Inc., c/o Wayne L. Dilucente, 455 38th Court, Vero Beach, Florida 32968.

[3] In addition, Wodlinger Broadcasting of Naples, Inc. filed a Request to File Supplemental Comments, Supplemental Comments, and a Request for Official Notice. Edens Broadcasting, Inc. filed an Opposition to the Wodlinger request to file supplemental comments. FW Communications, Inc. filed a Motion to Strike directed against the Wodlinger request for official notice. Edens Broadcasting, Inc. filed a Motion for Leave to File Supplemental Comments and Supplemental Comments. Wodlinger filed a Motion to Strike directed against the supplemental comments filed by Edens Broadcasting. Edens Broadcasting filed an Opposition directed against the Wodlinger Motion to Strike.

[4] On April 9, 1990, the Commission affirmed the staff action denying this application. 5 FCC Rcd 2576 (1990), *recon dismissed* 6 FCC Rcd 4327 (1991). Edens Broadcasting, Inc. has petitioned the U.S. Court of Appeals for review of that Commission action. *Edens Broadcasting, Inc. v. FCC*, Case No. 91-1387 (D.C. Cir.).

[5] Inasmuch as this request was filed prior to the October 4, 1990, effective date of the Commission action in *Amendment of Section 1.420 and Section 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911 (1990), it was not necessary for FW Communications, Inc. to include an affidavit that it received no consideration for this withdrawal.

restriction of 31.2 kilometers (19.4 miles) southwest.[6] At this distance, such a facility would not provide the requisite 70 dB/u signal to Solana in contravention of Section 73.315(a) of the Rules.[7] The failure to comply with Section 73.315(a) of the Rules is fatal to this proposal, and we see no public interest benefit in considering such a defective rule making proposal in any proceeding involving multiple parties. *See Terrell and Daingerfield, Texas,* 5 FCC Rcd 556 (1990).

6. We believe that the public interest would be served by the substitution of Channel 288C3 for Channel 288A at Naples Park, Florida, and the modification of the license of Station WIXI to specify operation on Channel 288C3.[8] In order to accommodate this upgrade, we are also substituting Channel 285A for Channel 287A at Solana, Florida, and are modifying the construction permit of Station WMMY, Solana, to specify operation on Channel 285A.[9] However, as noted earlier, a Channel 285A allotment at Solana conflicts with the application of Edens Broadcasting, Inc. specifying Class C facilities for Station WRBQ in Tampa, Florida (File No. BPH-830714AT).[10] In view of the fact that Edens Broadcasting, Inc. has sought judicial review of the Commission denial of that application, it is necessary to condition both the Channel 288C3 substitution at Naples Park and the Channel 285A substitution at Solana on the outcome of that appeal.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

Community	Channel No.
Naples Park, Florida	288C3
Solana, Florida	285A

8. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of Wodlinger Broadcasting of Naples, Inc. for Station WIXI, Naples Park, Florida, IS MODIFIED to specify operation on Channel 288C3 in lieu of Channel 288A subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the licensee shall submit to the Commission a minor change application for construction permit (FCC Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620: and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the construction permit of West Florida Media, Inc. for Station WMMY, Solana, Florida, IS MODIFIED to specify operation on Channel 285A in lieu of Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the authorization for Station WMMY except for the channel as specified above. Any other change, except those specified under Section 73.1260 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301);

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with the station's authorization except for

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[6] Using maximum facilities, the principal city contour of a Class C3 station will extend 23.2 kilometers (14.4 miles).

[7] In *Woodstock and Broadway, Virginia,* 3 FCC Rcd 6398 (1988), the Commission created an exception to the policy of assuming uniform terrain in FM allotment proceedings. In that proceeding, the proponent for the channel upgrade demonstrated that a specific transmitter site was available and FAA approval could be obtained, and depicted the terrain profile on the radial between the transmitter and the community of license. In the present situation, West Florida has not submitted an exhibit depicting the terrain profile on the radial between the proposed transmitter site and Solana. In this regard, our own engineering review of this matter indicates that the height above mean sea level of the transmitter site is 5.6 meters. The average elevation along the radial between the transmitter site and Solana is 7.1 meters above mean sea level. Therefore, there is no height above average terrain advantage from this site that would compensate for the excessively long distance this transmitter site would be from Solana.

[8] The reference coordinates for the Channel 288C3 allotment at Naples Park, Florida, are 26-13-56 and 81-45-10. This site is 6.1 kilometers (3.8 miles) southeast of Naples Park. Because the petition for rule making was filed prior to October 2, 1989, Wodlinger Broadcasting of Naples, Inc. may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules with respect to Station WCAC, Channel 288A, Sebring, Florida, and Station WKZM, Channel 288A, Sarasota, Florida.

[9] The reference coordinates for the Channel 285A allotment at Solana, Florida, are 26-50-41 and 82-02-15. This site is 11.4 kilometers (7.1 miles) south of Solana. In accordance with *Circleville, Ohio,* 8 FCC 2d 159 (1967), Wodlinger Broadcasting of Naples, Inc. will be required to reimburse West Florida Media, Inc. for the legitimate and prudent costs incurred in changing its channel. In the event that Edens Broadcasting, Inc. is successful in its judicial appeal, Wodlinger Broadcasting of Naples, Inc. will also be required to reimburse West Florida Media, Inc. for the legitimate and prudent costs incurred in changing its channel back to Channel 287A.

[10] In its Comments, Edens Broadcasting, Inc. has suggested an alternate site for the Channel 288C3 upgrade at Naples Park and an alternate site for the existing Channel 287A allotment at Solana. The new site for the Solana allotment would obviate the need for a Channel 285A substitution. However, changing the transmitter site of Station WMMY would be a modification of the construction permit requiring an *Order to Show Cause.* At this juncture, we do not believe that it would be conducive to the efficient transaction of Commission business to issue another *Order to Show Cause* against West Florida Media, Inc. looking toward a change in transmitter site. We also note that in its Reply Comments, West Florida Media, Inc. submitted an engineering exhibit indicating that at the proposed site for its Channel 287A allotment, Station WMMY would not be able to operate at sufficient height to provide Solana with the requisite 70 dBu signal.

the channel as specified above, and a license application (FCC Form 302) is filed within 10 days of commencement of program tests.

10. IT IS FURTHER ORDERED, That the modification of the license of Station WIXI to specify operation on Channel 288C3 and the modification of the construction permit of Station WMMY to specify operation on Channel 285A ARE EXPRESSLY CONDITIONED on the final outcome of the judicial appeal in *Edens Broadcasting, Inc. v. FCC*, Case No. 91-1387 (D.C. Cir.).

11. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the following:

Wodlinger Broadcasting of Naples, Inc.
Radio Station WIXI
868 99th Avenue North
Naples Park, Florida 33963

West Florida Media, Inc.
Radio Station WMMY
455 38th Court
Vero Beach, Florida 32968

12. IT IS FURTHER ORDERED, That the counterproposal filed by FW Communications, Inc. for a Channel 285A allotment at Cypress Lake, Florida, IS DISMISSED.

13. IT IS FURTHER ORDERED, That the counterproposal filed by West Florida Media, Inc. for a Channel 285C3 upgrade for Station WMMY, Solana, Florida, IS DENIED.

14. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

15. For further information concerning this proceeding, contact Robert Hayne, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief, Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 91-43

In the Matter of

Amendment of Section 73.202(b), RM-7607
Table of Allotments,
FM Broadcast Stations.
(Portageville and
New Madrid, Missouri)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1992; Released: June 29, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration[1] filed by Dianne Anderson ("Anderson"). Anderson seeks reconsideration of the Commission's action denying as unacceptable her April 22, 1991, counterproposal and comments proposing the substitution of Channel 291C2 for Channel 291A at Charleston, Missouri, and modification of her construction permit for Station WKKZ accordingly.[2]

2. Although Anderson's counterproposal was denied in this proceeding, it was separately accepted for rule making and a *Notice of Proposed Rule Making* was issued proposing the substitution at Charleston. *See* 6 FCC Rcd 4396 (1991). The *Report and Order* in MM Docket 91-218, 7 FCC Rcd 1620 (1992), granted the request and is no longer subject to review. In light of these facts, Anderson has filed comments requesting the withdrawal and dismissal of her Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the petition of Diane Anderson IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

5. For further information concerning this proceeding contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

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[1] Public Notice was given on September 27, 1991 (Report No. 1862).

[2] New Madrid County Broadcasting Company filed an opposition to which Dianne Anderson filed a reply. In view of Anderson's withdrawal of the petition for reconsideration, these comments are moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-164

In the Matter of

Amendment of Section 73.202(b),	RM-6814
Table of Allotments,	RM-6926
FM Broadcast Stations.	RM-7706
(St. Augustine, St. Augustine	RM-7707
Beach, and Gainesville, Florida)[1]	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 12, 1992; Released: June 29, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1888 (1990), issued in response to two separate petitions for rule making. Kyle E. Magrill ("Magrill") requested the allotment of Channel 231A to St. Augustine Beach, Florida, as that community's first local service (RM-6926). First City Broadcasting, Inc. ("First City"), then licensee of Station WSOS(FM), Channel 288A, St. Augustine, Florida, had requested the substitution of Channel 231C3 or Channel 288C3 for Channel 288A at St. Augustine, Florida, and modification of First City's license to specify the higher class channel. In order to accommodate the upgrade on Channel 288C3, the substitution of Channel 287A for Channel 288A at Gainesville, Florida, and the modification of the license for Station WYKS accordingly, would be necessary (RM-6814). The *Notice* sought comment on First City's proposal to substitute Channel 231C3 for Channel 288A at St. Augustine.[2]

2. In response to the *Notice*, Ariel Broadcasting, Inc. ("Ariel"), licensee of AM Station WYOC, St. Augustine, Florida, and Magrill filed comments in support of the St. Augustine Beach proposal. Country Broadcasting Company ("Country"), former licensee of Station WYOC(FM), Channel 287A, High Springs, Florida, filed opposing comments. WSOS-FM, Inc. ("WSOS"), the new licensee of Station WSOS(FM),[3] filed comments requesting the substitution of Channel 288C3 for Channel 288A at St. Augustine, Florida, and the substitution of Channel 287A for Channel 288A at Gainesville, Florida. Carl Tutera, Sr. ("Tutera") filed comments requesting the allotment of Channel 231C3 to St. Augustine Beach, Florida, as that community's first local service. The comments of Tutera and WSOS have been treated as counterproposals in this proceeding.[4] Ariel, Robert V. Barnes ("Barnes"),[5] Magrill, Jack L. Messmer ("Messmer"), WSOS, and Gillen Broadcasting Corporation ("Gillen"), licensee of Station WYKS, Channel 288A, Gainesville, Florida, filed reply comments. Gillen, Magrill, Messmer, Tutera, WSOS, and Santa Fe Wireless, Inc. ("Santa Fe"), now licensee of Station WYOC, Channel 285A, High Springs, Florida,[6] filed comments in response to the counterproposals.

COMMENTS

3. Magrill states that his proposal to allot Channel 231A to St. Augustine Beach would provide a first transmission service to the community. He claims the allotment would also serve 39,064 persons, approximately 9,563 persons more than the St. Augustine upgrade. Magrill further contends that Station WSOS(FM)'s license could not be modified to the higher class channel pursuant to Section 1.420(g) of the Commission's Rules, since there is a competing expression of interest in Channel 231A, and First City failed to specify an equivalent channel for other interested parties.[7]

4. Tutera seeks the allotment of Channel 231C3 to St. Augustine Beach in lieu of Channel 231A as that community's first local FM service. Tutera states that acceptance of his proposal would promote diversity in the market and would also constitute the most efficient use of the channel in the community.[8]

5. WSOS in its comments states that it prefers the substitution of Channel 231C3 for Channel 288A at St. Augustine and the allotment of Channel 288A to St. Augustine Beach. WSOS states that if the Commission determines that this proposal would not involve an

[1] The community of Gainesville, Florida, has been added to the caption.

[2] First City's proposal to substitute Channel 288C3 at St. Augustine was not considered in the *Notice*, because the substitution of Channel 287A for Channel 288A at Gainesville, would result in a 1.3 kilometer short-spacing to the licensed site of Station WYOC(FM), Channel 285A, High Springs, Florida. *See Notice* at n.1.

[3] On May 15, 1990, an assignment of license for Station WSOS(FM) was granted to WSOS-FM, Inc.

[4] Public Notice of the counterproposals was given April 18, 1991, Report No. 1843 (RM-7706 and RM-7707).

[5] Barnes expresses an interest in applying for Channel 231C3 at St. Augustine. However, he filed his expression of interest after the deadline for comments in this proceeding. Therefore, we will not consider his comments herein. *See Santa Isabel, Puerto Rico*, 3 FCC Rcd 2336 (1988), *aff'd*, 4 FCC Rcd 3412 (1989), *aff'd sub nom. Amor Family Broadcasting Group v. FCC*, 918 F.2d 960 (D.C. Cir. 1990).

[6] Santa Fe's assignment of license from Country Broadcasting Company was granted on November 5, 1990 (File No. BALH-900911GZ).

[7] Section 1.420(g) of the Commission's Rules states that modification of a station's license to another class of channel may only be made if one of the following conditions are met: (1) There are no other timely expressions of interest in the channel; (2) An equivalent class of channel is available for other interested parties; or (3) The proposed upgrade is on a mutually exclusive, higher class adjacent or co-channel. We note that although Magrill has filed a competing proposal for the use of Channel 231 in another community, no party has filed a timely expression of interest in the use of Channel 231C3 at St. Augustine.

[8] Ariel filed reply comments in support of Tutera's proposal. This expression of interest is untimely and will not be considered herein. *See* note 5, above.

incompatible channel swap,[9] then it would pursue its earlier proposal to upgrade Station WSOS(FM) on Channel 288C3 and to substitute Channel 287A for Channel 288A at Gainesville, Florida. WSOS states that Channel 288A at Gainesville is presently short-spaced to WSOS(FM), St. Augustine, Florida; WYOC(FM), High Springs, Florida; WQLC(FM), Watertown, Florida, and a proposed allotment of Channel 288C2 at New Port Richey, Florida. WSOS argues that Channel 287A can be substituted for Channel 288A at Gainesville's present transmitter site and eliminate all short-spacings except for WYOC(FM), High Springs, Florida, which will maintain its existing short-spacing. WSOS contends that it is Commission policy to accept short-spaced channel substitutions as long as they "can be accomplished without creating any additional short spacing...," citing *Vero Beach, Florida*, 3 FCC Rcd 1632 (1988),[10] and *East Los Angeles and Long Beach, California*, 5 FCC Rcd 956 (1990). WSOS also states that should a channel substitution be required for Station WYKS(FM), Gainesville, Florida, it will reimburse the licensee for its reasonable costs associated with the change in frequency.

6. Country in its comments supports the Commission's initial refusal to consider First City's proposal to substitute Channel 287A for Channel 288A at Gainesville to accommodate Channel 288C3 at St. Augustine. It requests that the Commission continue to reject any proposal which would result in a short-spacing to Station WYOC(FM), without the consent of Country.

REPLY COMMENTS

7. WSOS supports Ariel's proposal to allot Channel 231A to St. Augustine Beach, but opposes Country's contentions regarding the Gainesville channel substitution. WSOS argues that the substitution is permissible, as it would create no new short-spacing to Station WYOC. WSOS disputes Magrill's estimate of Station WSOS(FM)'s service area as a Class C3 facility and claims that the station would increase its population served from approximately 38,012 people to 107,640 people. Finally, WSOS opposes Tutera's proposal to allot Channel 231C3 to St. Augustine Beach because it is mutually exclusive with the St. Augustine upgrade.

8. Magrill objects to WSOS's suggestion to allot Channel 288A to St. Augustine Beach. He contends that Channel 288A would be short-spaced to Station WYKS, Gainesville, Florida by 6.54 kilometers as a 6 kW station. He argues that Channel 288A cannot be allotted as a "grandfathered" 3 kW channel because the channel must be allotted to St. Augustine Beach under existing allotment standards. Magrill states that Channel 231A is fully spaced as a 6 kW channel. Furthermore, Magrill maintains that there is no area available for a 6 kW operation on Channel 288A. He claims that what little land area that may be available is substantially undeveloped parklands on an island bordering the ocean. Therefore, it would be economically and environmentally impossible to build a practical transmitter site.

9. Gillen, licensee of Station WYKS, Gainesville, believes the Commission erroneously rejected WSOS's original proposal involving the substitution of Channel 287A for Channel 288A at Gainesville. Gillen notes that the rejection was based on the existence of a 1.3 kilometer short spacing between proposed Channel 287A, Gainesville, and Channel 285A, High Springs. However, Gillen claims, the two stations have a grandfathered short spaced relationship on their current channels, and no new short spacing would be created by the Gainesville substitution. Gillen states that the public interest would be served by moving Station WYKS, Gainesville, to Channel 287A because the change in channel would eliminate three short spacings which result from the new 6 kW spacing requirements. Under the new spacings rules, Station WYKS as a 6 kW station is short-spaced to Station WSOS(FM), St. Augustine, Station WYOC(FM), High Springs, Station WQLC(FM), Watertown, Florida, and to a pending proposal to allot Channel 288C2 at New Port Richey, Florida. Gillen argues that as a result of these short spacings Station WYKS has no chance of increasing its facilities on Channel 288A. However, by substituting Channel 287A at Gainesville, three of the four short spacings will be eliminated, thereby providing Station WYKS with options to increase its coverage to 6 kW, such as a transmitter site relocation to the south, contour protection pursuant to §73.215 of the Commission's Rules or mutual consent pursuant to §73.213 of the Commission's Rules. Gillen also recognizes that Country opposes WSOS's proposal to change the Gainesville channel. Gillen argues that Country has no legal basis to object, and offers no arguments or case law in support of its position. Gillen states that it will accept a modification of its license for Station WYKS to specify Channel 287A. It understands that WSOS will be required to reimburse Gillen for the reasonable costs of the frequency change and that WSOS has agreed to do so.

COMMENTS IN RESPONSE TO COUNTERPROPOSALS

10. Tutera opposes WSOS's proposal to upgrade on Channel 231C3, since it would preclude the allotment of Channel 231C3 to St. Augustine Beach. However, both Tutera and Magrill support WSOS's proposal to substitute Channel 288C3 for Channel 288A at St. Augustine, and to

[9] WSOS states that pursuant to Section 1.420(g)(3) of the Commission's Rules, it may receive an upgrade on a non-adjacent channel as long as an incompatible channel swap occurs in making the upgrade, citing *Pikeville, Kentucky and Matewan, West Virginia*, 5 FCC Rcd 3732 (1991). WSOS argues that it has proposed an incompatible channel swap that would allow the existing Channel 288A at St. Augustine to be allotted to St. Augustine Beach as a new Class A channel, and the substitution of Channel 231C3 for Channel 288A to St. Augustine. WSOS contends that this arrangement would create a first local service to St. Augustine Beach, and it would allow WSOS to upgrade its station on Channel 231C3 at its present transmitter site. We need not address this issue herein, as no timely expressions of interest in the allotment of Channel 231C3 at St. Augustine were filed.

[10] In *Vero Beach*, the Commission stated that we will accept proposals that would create a short-spaced allotment so long as the short-spacing currently exists to the same station and is not increased. In *Eatonton and Sandy Springs, Georgia, and Anniston and Lineville, Alabama*, 6 FCC Rcd 6580 (1991), *recon. pend.*, the Commission modified *Vero Beach* to the extent that we may not grant an allotment proposal involving a waiver of the minimum distance separation requirements without analyzing the effect of the proposal on relevant interfering and protected contours.

substitute Channel 287A for Channel 288A at Gainesville, Florida. Tutera and Magrill restate their intention to apply for Channel 231C3, if allotted.

11. Gillen reiterates its willingness to accept a substitution of Channel 287A for Channel 288A at Gainesville and modification of its license for Station WYKS(FM) accordingly to permit the Channel 288C3 substitution at St. Augustine. Gillen contends that this plan would provide WSOS with a Class C3 upgrade and permit the allotment of Channel 231C3 at St. Augustine Beach as its first local service. Gillen further states that even though Channel 288C3 has not been suggested for allotment to St. Augustine Beach as its first local service, the allotment may be possible if Station WYKS(FM) changed channels. In that event, Gillen states that it would expect reimbursement from WSOS. Under such a plan, WSOS could receive its preferred Channel 231C3 upgrade. However, Gillen notes that no party supporting the allotment of a C3 channel at St. Augustine Beach has indicated a willingness to reimburse Gillen for its channel change.

12. Messmer states that he supports the allotment of any channel to St. Augustine Beach. However, he objects to the coordinates specified by Tutera (29-50-36 and 81-16-06). Messmer argues that a reference point inside St. Augustine Beach creates a strong possibility that no useable site could be obtained. He claims that finding available land which would meet local zoning and environmental requirements, as well as the requirements of the Commission and Federal Aviation Administration, in a populated region of the Atlantic coastline is a difficult proposition. Messmer contends that rather than create an allotment which may be unusable, the Commission should designate a special reference point (29-50-52 and 81-19-42) if Channel 231C3 is allotted to St. Augustine Beach.[11]

13. WSOS restates that its preferred option is to upgrade Station WSOS(FM) on Channel 231C3 and to allot the vacated Channel 288A to St. Augustine Beach as a first local service. WSOS states that improved service to St. Augustine could be instituted immediately on Channel 231C3 at WSOS's present transmitter site, thereby providing service to over 69,000 additional persons. WSOS restates that it would accept an upgrade on Channel 288C3 at St. Augustine, if additional expressions of interest in Channel 231C3 at St. Augustine are filed. WSOS contends that the city of Gainesville would benefit from the allotment of 288C3 in St. Augustine, since the substitution of Channel 287A for Channel 288A in Gainesville will provide a greater opportunity in the future for WYKS to increase its operating power, thereby improving service to Gainesville. WSOS restates its intention to pay WYKS's reasonable expenses incurred in moving to Channel 287A in the event WSOS is upgraded on Channel 288C3.

14. Santa Fe states that Station WYOC at High Springs operates with a radiating power of 1.6 kW at 450 feet above the average terrain at High Springs, Florida, immediately adjacent to the Gainesville area, and derives a portion of its income from Gainesville. Santa Fe contends that permitting Station WYKS to move from the third adjacent (288A) to the second adjacent (287A) channel and increase its power to 6 kW ERP would cause serious interference between Stations WYOC and WYKS. Santa Fe states that a representative from WYKS sought a joint agreement between Station WYKS and Station WYOC to increase Station WYKS's power to 6 kW and to accept interference from each other, and that Santa Fe rejected the offer.[12]

DISCUSSION

15. We have carefully reviewed all of the pleadings before us and find that the public interest would be served by the provision of a first local service at St. Augustine Beach as well as the expansion of service by Station WSOS(FM) at St. Augustine. As a threshold matter, we have reexamined our initial refusal to consider the substitution of Channel 288C3 for Channel 288A at St. Augustine and the substitution of Channel 287A for Channel 288A at Gainesville. This proposal was dismissed as unacceptable because the allotment of Channel 287A to Gainesville would be 1.3 kilometers short-spaced to the licensed site of Station WYOC(FM), Channel 285A, High Springs. As Gillen correctly notes, the present allotment of Channel 288A at Gainesville is 1.3 kilometers short-spaced to Channel 285A at High Springs, and the substitution of Channel 287A for Channel 288A would not increase the short-spacing. However, we must also examine the effect of the proposal on relevant interfering and protected contours. *See* n.10. An engineering analysis indicates that 150 persons are currently within the area created by the intersection of the Gainesville Channel 288A interfering contour and the High Springs Channel 285A protected contour. The population within this area would increase by 2,250 persons if Channel 287A was substituted for Channel 288A at Gainesville, using current facilities. Our analysis estimates the total population served by the High Point station as 51,226 persons. The proposed substitution would potentially create new interference to some 4.39% of the total population served by the High Point station, as opposed to the existing interference to 0.29% of the total population served. While we recognize that the Gainesville channel substitution would remove short-spacings to other area stations, we do not believe that the public interest would be served by the creation of an additional area of interference. Therefore, we correctly refused to consider the Gainesville substitution proposal, and Santa Fe's concerns regarding a 6 kW operation on Channel 287A at Gainesville are moot.

16. We therefore have before us timely filed expressions of interest in the allotment of either Channel 231A or Channel 231C3 to St. Augustine Beach, as well as WSOS's proposals to substitute 231C3 for Channel 288A at St. Augustine. The substitution of Channel 231C3 at St. Augustine and the allotment of Channel 231C3 to St. Augustine Beach are mutually exclusive. However, we may accommodate both the upgraded channel at St. Augustine and a first local service at St. Augustine Beach. Both requests can be accommodated by substituting Channel 231C3 for Channel 288A at St. Augustine and by allotting vacated Channel 288A to St. Augustine Beach. The substitution of Channel 231C3 at St. Augustine would permit Station WSOS to use its existing transmitter to effectuate the upgrade. We believe the public interest would be

[11] This site would place a 5.8 kilometers (3.6 mile) site restriction on the allotment.

[12] A staff engineering analysis has confirmed that the substitution of Channel 287A for Channel 288A at Gainesville as a 6 kW station would increase the short-spacing between the Gainesville and High Springs stations by 4 kilometers.

better served by providing St. Augustine with a wide coverage area service and St. Augustine Beach with a first local service. We will allot Channel 288A to St. Augustine Beach, since there is an expression of interest in a Class A channel at St. Augustine Beach.

17. Channel 288A can be allotted to St. Augustine Beach, Florida, in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[13] Channel 231C3 can substituted for Channel 288A at St. Augustine, Florida, at its existing transmitter site in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.6 kilometers (4.7 miles) west-northwest of the community.[14]

18. Based on the above information, we believe the public interest would be served by the allotment of Channel 288A to St. Augustine Beach, Florida, since it would provide the community with its first local FM service, and the substitution of Channel 231C3 for Channel 288A at St. Augustine, Florida. In accordance with Section 1.420(g) of the Commission's Rules, we are modifying the license for Station WSOS(FM) to specify operation on Channel 231C3, since no timely expressions of interest were filed for the non-adjacent St. Augustine upgrade.

19. Accordingly, pursuant to the authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 13, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, as follows:

City	Channel No.
St. Augustine, Florida	231C3
St. Augustine Beach, Florida	288A

20. The window period for filing applications for Channel 288A at St. Augustine Beach, Florida, will open on **August 14, 1992,** and close on **September 14, 1992.**

21. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license of WSOS-FM, Inc., for Station WSOS(FM), St. Augustine, Florida, IS MODIFIED, to specify operation on Channel 231C3 in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.307 of the Commission's Rules.

22. IT IS FURTHER ORDERED, That the petition for rule making filed by Kyle E. Magrill (RM-6926), requesting the allotment of Channel 231A to St. Augustine Beach, Florida, IS DENIED.

23. IT IS FURTHER ORDERED, That the petition for rule making filed by Carl Tutera, Sr. (RM-7706) requesting the allotment of Channel 231C3 to St. Augustine Beach, Florida, IS DENIED.

24. IT IS FURTHER ORDERED, That the petition for rule making filed by WSOS-FM, Inc. (RM-7707), requesting the substitution of Channel 288C3 for Channel 288A at St. Augustine, and the substitution of Channel 287A for Channel 288A at Gainesville, Florida, IS DENIED.

25. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

26. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

[13] The coordinates for Channel 288A at St. Augustine Beach are North Latitude 29-50-52 and West Longitude 81-19-42.

[14] The coordinates for Channel 231C3 at St. Augustine are North Latitude 29-55-05 and West Longitude 81-23-26. Since this proposal was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Rules with respect to Station WCHY(FM), Channel 231C, Savannah, Georgia.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-138

In the Matter of

Amendment of Section 73.202(b) RM-8003
Table of Allotments,
FM Broadcast Stations.
(Winlock, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 17, 1992; Released: June 29, 1992

Comment Date: August 20, 1992
Reply Comment Date: September 4, 1992

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Premier Broadcasters, Inc. ("petitioner") requesting the allotment of Channel 236A at Winlock, Washington, as the community's first local aural transmission service. Petitioner states it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 236A at Winlock, Washington, since it could provide the community with its first local aural transmission service. Channel 236A can be allotted to Winlock in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Since Winlock is located within 320 kilometers (200 miles) of the U.S.-Canadian border, Canadian concurrence has been requested.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Winlock, Washington	---	236A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 20, 1992,** and reply comments on or before **September 4, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Meredith S. Senter, Jr., Esq.
Leventhal, Senter & Lerman
Suite 600
2000 K Street, N.W.
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly E. McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 236A at Winlock are North Latitude 46-29-30 and West Longitude 122-56-12.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
DIAL 'N SAVE, INC.
(T/A DIAL AMERICA),
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
TELAMARKETING CORP.
OF LOUISIANA,
TOTAL-TEL USA,
VALU-LINE OF THE
LEHIGH VALLEY, INC.
(T/A CHADWICK VALU-LINE),
and WESTEL, INC.,
Complainants,

v.

THE BELL ATLANTIC TELEPHONE COMPANIES,	File No. E-91-135
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-142
NEW YORK TELEPHONE COMPANY,	File No. E-91-143
Defendants.	

ORDER

Adopted: June 17, 1992; Released: June 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Communigroup of K.C., Inc., Dial 'N Save, Inc. (T/A Dial America), Long Distance Service, Inc., Metromedia Long Distance, Inc., National Teleservices, Inc., RCI Network Services, Inc., TelaMarketing Corp. of Louisiana, Total-Tel USA, Valu-Line of the Lehigh Valley, Inc. (T/A Chadwick Valu-line), and Westel, Inc. (hereinafter complainants), may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Some defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainants when their overall interstate rates of return were below the authorized level.[10] Defendants also contend that an award of damages based on the measure advocated by complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will

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issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Complainants also seek interest on this amount as well as costs. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to complainants' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] *See, e.g.*, Memorandum in Support of Motions to Dismiss of New York Telephone Company and New England Telephone and Telegraph Company at 8 (filed January 15, 1992).

establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
LONG DISTANCE SERVICE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TELEPHONE ASSOCIATES LONG DISTANCE SERVICES, INC., and
TOTAL-TEL USA,
Complainants,

v.

INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-91-136
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-91-137
OHIO BELL TELEPHONE COMPANY, and	File No. E-91-138
WISCONSIN BELL, INC.,	File No. E-91-139

Defendants.

ORDER

Adopted: June 17, 1992; Released: June 29, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Communigroup of K.C., Inc., Long Distance Service, Inc., National Teleservices, Inc., RCI Network Services, Inc., Schneider Communications, Inc., TelaMarketing Corp. of Louisiana, Telephone Associates Long Distance Services, Inc., and Total-Tel USA (hereinafter complainants), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*.[8] and, therefore, unlawful. Defendants also contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainants if their overall interstate rates of return were below the authorized level.[9]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation

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[7] Complainants also seek interest on this amount as well as costs. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Michigan Bell, Wisconsin Bell, and the Ameritech Operating Companies state that their overall interstate rates of return were below the Commission's authorized level. Further, it appears that the Ameritech companies contend that the relevant overall interstate rate of return is that of Ameritech in the aggregate, not each of its component operating companies. The Commission previously addressed and rejected this issue in the *MCI* and *AT&T Liability Orders*. *See e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
CONTACT AMERICA, INC.,
GAREY M WALLACE COMPANY,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
NTS COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA,
VALU-LINE OF ST. JOSEPH, INC., and
WESTEL, INC.,
Complainants,

v.

SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant. File No. E-91-148

ORDER

Adopted: June 17, 1992; Released: June 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Communigroup of K.C., Inc., Contact America, Inc., Garey M Wallace Company, Long Distance Service, Inc., Metromedia Long Distance, Inc., National Teleservices, Inc., NTS Communications, Inc., TelaMarketing Corp. of Louisiana, Total-Tel USA, Valu-Line of St. Joseph, Inc., and Westel, Inc. (hereinafter complainants), may be entitled to recover damages as a result of the defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainants and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendant for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendant raises a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendant argues that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant contends(that the fact that its rates produced overearnings in one access service category is not sufficient to establish damage to complainants if its overall interstate rate of return was below the authorized level. Defendant maintains that, under *AT&T v. FCC*, it must be allowed to offset overearnings against underearnings. Defendant also contends that an award of damages based on the measure advocated by complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates they actually paid for defendant's interstate access services and the rates they would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories defendant may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of its access service offerings to establish or support its claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendant's excessive earning levels. Moreover, defendant's factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that complainants' share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendant's access services during the relevant monitoring period and the amount complainants would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendant.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be

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[7] Complainants also seek interest on this amount as well as costs. We note that defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendant may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TELEPHONE ASSOCIATES LONG DISTANCE SERVICES, INC.,
TOTAL-TEL USA, and
U.S. LINK,
Complainants,

v.

MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, and	File No. E-91-140
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-141

Defendants.

ORDER

Adopted: June 17, 1992; Released: June 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., TelaMarketing Corp. of Louisiana, Telephone Associates Long Distance Services, Inc., Total-Tel USA, and U.S. Link (hereinafter complainants), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, relate to a period prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.,* 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.,* 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia,* a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

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5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants contend that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants argue that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to complainants since complainants would not flow through such damages to their own customers.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation

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[8] Complainants also seek interest on this amount as well as costs. We note that defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Answer and Affirmative Defenses of The Mountain States Telephone and Telegraph Company and Northwestern Bell Telephone Company at 6 (filed January 15, 1992). We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA, and
WESTEL, INC.,
Complainants,

v.

PACIFIC BELL TELEPHONE COMPANY, and	File No. E-91-144
NEVADA BELL TELEPHONE COMPANY,	File No. E-91-145

Defendants.

ORDER

Adopted: June 17, 1992; Released: June 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Long Distance Service, Inc., Metromedia Long Distance, Inc., National Teleservices, Inc., TelaMarketing Corp. of Louisiana, Total-Tel USA, and Westel, Inc. (hereinafter complainants), may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendants also maintain that they must be allowed to offset overearnings in individual access categories against underearnings in access categories.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery

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[7] Complainants also seek interest on this amount as well as costs. We note that defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of

Amendment of Part 0
of the Commission's
Rules to Reflect a
Reorganization of the
Office of Managing
Director

ORDER

Adopted: October 21, 1991; Released: June 30, 1992

By the Managing Director:

1. The Commission has before it for consideration proposed changes in the organization of the Office of Managing Director. Implementation of the proposed changes requires amendments to Section 0.231 of the Commission's Rules and Regulations.

2. To promote a more efficient and effective organizational structure, the Commission is hereby approving the realignment of the functions and elements of the Internal Control and Security Office within the Office of Managing Director. The physical, personnel and information security functions as well as the ethics function of the Internal Control and Security Office will remain intact, and will be placed within the Operations Support Division of the Office of Managing Director as a separate unit. The non-security functions of the Internal Control and Security Office will be transferred to offices within the Office of Managing Director which are already performing related tasks.

3. The amendments adopted herein pertain to agency organization. The prior notice procedure and effective date provisions of Section 4 of the Administrative Procedure Act are therefore inapplicable. Authority for the amendments adopted herein is contained in Sections 4(i) and 5(b) of the Communications Act of 1934, as amended.

4. IT IS ORDERED, effective October 21, 1991 that Part 0 of the Rules and Regulations is amended as set forth in the Appendix hereto.

FEDERAL COMMUNICATIONS COMMISSION

Andrew S. Fishel
Managing Director

APPENDIX

47 C.F.R. Part 0 is amended as follows:

1. 47 C.F.R. § 0.231 is amended by modifying paragraph (h) to read as follows:

Section 0.231 Authority Delegated.

(h) The Chief of the Operations Support Division, Office of the Managing Director, is delegated authority to act as the "designated agency ethics official" within the meaning of sections 206 and 209 (10) of the Ethics in Government Act of 1978, Pub. L. 95-521, 92 Stat. 1824 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
TOTAL-TEL USA, and
VALU-LINE OF ST. JOSEPH, INC.,
Complainants,

v.

UNITED TELEPHONE COMPANY OF THE CAROLINAS,	File No. E-91-149
UNITED TELEPHONE COMPANY OF INDIANA, INC.,	File No. E-91-150
UNITED INTER-MOUNTAIN TELEPHONE COMPANY,	File No. E-91-151
UNITED TELEPHONE COMPANY OF NEW JERSEY, INC.,	File No. E-91-152
UNITED TELEPHONE COMPANY OF THE NORTHWEST,	File No. E-91-153
UNITED TELEPHONE COMPANY OF OHIO,	File No. E-91-154
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-91-155
UNITED TELEPHONE COMPANY OF KANSAS, INC., and	File No. E-91-156
UNITED TELEPHONE COMPANY OF MISSOURI,	File No. E-91-157
Defendants.	

ORDER

Adopted: June 17, 1992; **Released: June 30, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Communigroup of K.C., Inc., Total-Tel USA,[1] and Valu-Line of St. Joseph, Inc. (hereinafter complainants), may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable

[1] On April 24, 1992, complainant Total-Tel USA filed a motion to dismiss its claim against defendant United Telephone Company of New Jersey, Inc. because complainant concluded that it had not purchased switched access from defendant during the relevant monitoring period. We grant complainant's motion for partial dismissal of the complaint.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise several challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] Defendants primarily argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. Defendants also contend that an award of damages based on the measure advocated by the complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will

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[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Complainants also seek interest on this amount as well as costs. We note that defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to complainants' claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

11. IT IS FURTHER ORDERED THAT Total-Tel USA's Motion for Partial Dismissal of its complaint against United Telephone Company of New Jersey, Inc. IS GRANTED and that Total-Tel USA's portion of the complaint IS DISMISSED WITH PREJUDICE.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN NETWORK EXCHANGE, INC.,
COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
LONG DISTANCE SERVICE, INC.,
METROMEDIA LONG DISTANCE, INC.,
NATIONAL TELESERVICES, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELAMARKETING CORP. OF LOUISIANA,
TOTAL-TEL USA, and
WESTEL, INC.,
Complainants,

v.

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, and — File No. E-91-146
SOUTH CENTRAL BELL TELEPHONE COMPANY, — File No. E-91-147
Defendants.

ORDER

Adopted: June 17, 1992; Released: June 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainants, American Network Exchange, Inc., Communications Services, Inc., Communigroup of K.C., Inc., Long Distance Service, Inc., Metromedia Long Distance, Inc., National Teleservices, Inc., RCI Network Services, Inc., Schneider Communications, Inc., TelaMarketing Corp. of Louisiana, Total-Tel USA, and Westel, Inc. (hereinafter complainants), may be entitled to recover damages as a result of the defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

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[1] South Central Bell Telephone Company has merged into Southern Bell Telephone and Telegraph Company, now renamed BellSouth Telecommunications, Inc. *See* 6 FCC Rcd 7136 (Com.Car.Bur. 1991). The subject complaints, however, were filed prior to the merger. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] MCI and AT&T relied, as do complainants here, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants also maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings against underearnings.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of

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Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Complainants also seek interest on this amount as well as costs. We note that defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TFN CORP.,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-203
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-204
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-205
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-206
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-207
NEW YORK TELEPHONE COMPANY, and	File No. E-90-208
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-209
Defendants.	

ORDER

Adopted: June 22, 1992; Released: June 30, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, TFN Corp. (TFN), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that TFN presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does TFN in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. TFN's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Some defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant when their overall interstate rates of return were below the authorized level.[10] Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings. Some defendants also contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. [11]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which TFN may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with TFN, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that TFN's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding TFN's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute TFN's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[12]

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[7] TFN also seeks interest on this amount. We note that one defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to TFN's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] *See, e.g.*, Memorandum in Support of Motion to Dismiss of New York Telephone Company at 7 (filed June 25, 1990).

[11] *See e.g.*, Joint Answer and Motion to Dismiss of The Bell Atlantic Telephone Companies at 1-2 (filed July 2, 1990).

[12] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

WILLIAM J. KITCHEN File No. BMP-910426AB

For Extension of Time To
Construct Station KBQN(AM)
Pago Pago, American Samoa

WILLIAM J. KITCHEN File No. BAP-910515EC
Assignor

and

OCEANIA BROADCASTING NETWORK, LTD. - HAWAII
Assignee

For Assignment of Construction Permit
for Station KBQN(AM), Pago Pago,
American Samoa

MEMORANDUM OPINION AND ORDER

Adopted: June 17, 1992; Released: June 30, 1992

By the Commission:

1. The Commission has before it for consideration an application for review filed November 12, 1991, by John H. Midlen, Jr. ("Midlen"). Midlen requests review of the action of October 11, 1991 by the Chief, Audio Services Division, Mass Media Bureau, denying his petition for reconsideration of the staff's grant of the above-captioned applications for an extension of time to construct the unbuilt facilities for station KBQN(AM) and for consent to assign the construction permit for a new AM station in Pago Pago, American Samoa from William J. Kitchen ("Kitchen") to Oceania Broadcasting Network, Ltd. - Hawaii ("Oceania"). Kitchen and Oceania filed a joint opposition to the application for review on November 19, 1991. Midlen filed a reply to the opposition on December 9, 1991.

I. BACKGROUND

2. Kitchen filed the above-captioned applications on April 26, 1991 and May 15, 1991 respectively. Midlen, Kitchen's former communications counsel, filed a pleading styled "Informal Objection," on July 10, 1991, contesting the extension and assignment applications. Midlen asserted that Kitchen failed to demonstrate, pursuant to 47 C.F.R. Sec. 73.3534(b)(3), that reasons beyond his control had prevented him from making substantial progress toward completing construction and that he had taken all possible steps to resolve the problem and proceed with construction. Furthermore, Midlen objected to the assignment application because that application was not filed before expiration of the original period for construction, as required by 47 C.F.R. Sec. 73.3535(d).

3. The staff denied Midlen's objections and granted the subject applications on August 12, 1991. *See Letter, Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau*, ref. 8910-JLM. On September 19, 1991, Midlen requested reconsideration of the staff's action granting the extension request and assignment application, alleging that an amendment to the extension request was defective because it contained a facsimile signature and that the staff committed legal error in granting the extension request in light of Commission precedent. Kitchen opposed the request for reconsideration, and Midlen filed a reply on October 15, 1991. However, the staff had denied reconsideration on October 11, 1991, before that reply was filed. *See Letter, Larry D. Eads, Chief, Audio Services Division, Mass Media Bureau*, ref. 8910-KMS. The reply contained matters not raised in Midlen's petition for reconsideration, *i.e.*, that Kitchen had abused the Commission's processes by threatening to file an ethics complaint with the D.C. Bar counsel against Midlen, as Kitchen's former attorney, if Midlen refused to withdraw his objections to the grant of the subject applications, and that Kitchen had violated the Commission's *ex parte* rules by failing to serve Midlen with pleadings and amendments filed after Midlen lodged his informal objection. The reply also reiterated arguments raised in the petition for reconsideration, namely, that Kitchen had not made a showing sufficient to support an extension of the construction permit because he failed to demonstrate that progress was made in the most recent construction period or give reasons why circumstances beyond his control prevented such progress.

4. Subsequently, Midlen filed a motion to vacate the staff's October 11, 1991 letter denying reconsideration, claiming that the denial letter was issued before the termination of the pleading cycle associated with the petition for reconsideration. Before the staff could act on this motion, Midlen filed an application for review of the staff's denial of his petition for reconsideration of the grant of the subject extension and assignment applications.[1] Midlen, in the application for review, makes only cursory reference to the merits of the staff's decision granting Kitchen's request for an extension of time to construct the station. Instead, the application for review references his reply pleading of October 15, 1991, and reasserts the abuse of process and *ex parte* arguments raised in that pleading.

II. DISCUSSION

5. *Alleged Ex Parte Violations.* Midlen contends that this is a restricted proceeding under the Commission's *ex parte* rules and, therefore, Kitchen's filing of a response to the informal objection and amendments to the subject applications without serving him with those pleadings amounts to a prohibited *ex parte* presentation to the Commission staff. *See* 47 C.F.R. Sec. 1.1202(a)-(b), 1.1204(a)(1)(i). We disagree.

[1] The matters raised in Midlen's reply pleading, which are reasserted in the application for review, will be considered herein, and Midlen's motion to vacate and for further reconsideration will be dismissed as moot.

6. Midlen argues that he lacked standing to file a petition to deny pursuant to 47 C.F.R. Sec. 73.3584, and therefore had no option but to file an informal objection. He argues that his pleading nonetheless was a formal opposition under the Commission's *ex parte* rules sufficient to restrict the proceeding, thus requiring Kitchen to serve him with pleadings. We agree that the definition of a formal opposition under the *ex parte* rules is not controlled by the statutory requirements for filing a petition to deny pursuant to 47 U.S.C. Sec. 309(d). *See Amendment of Subpart H, Part 1 of the Commission's Rules and Regulations Concerning Ex Parte Communications and Presentations in Commission Proceedings*, 2 FCC Rcd 3011, 3014-15 (1987), *modified and clarified*, 2 FCC Rcd 6053 (1987). Therefore, an informal objection which meets the criteria for a formal opposition set out in the *ex parte* rules is sufficient to render the proceeding restricted. In order for a pleading to be considered a formal opposition, that pleading must meet three requirements: the caption and text of that pleading must make it unmistakably clear that a formal opposition is intended; the pleading must be served; and the pleading must be filed within the time period, if any, prescribed by the Commission's rules. *Id.* at 3015; 47 C.F.R. Sec. 1.1202(e)(1). Here, Midlen's pleading was captioned "Informal Objection," and it is not clear from the face of the pleading itself that Midlen intended a formal opposition to the subject applications. Consequently, Midlen failed to satisfy the requirements for filing a formal opposition and this proceeding is exempt from the *ex parte* rules. *See also* 47 C.F.R. Sec. 1.1204(a)(1)(i) and 1.1202(e). Because the proceeding was not restricted, Kitchen's filing of an amendment and pleadings without service on Midlen did not constitute a prohibited *ex parte* presentation to the Commission staff.[2]

7. *Abuse of Process Allegations*. Both Midlen and Kitchen allege that the other has abused the Commission's processes. Midlen contends that Kitchen threatened him in order to induce him to withdraw his objections to the subject applications and Kitchen contends that Midlen has improperly used the instant proceeding, which involves his construction permit for a new station in Pago Pago, American Samoa, as a collection device in order to extract legal fees that he believes Kitchen owes him. In this regard, Kitchen cites Midlen's statement in an affidavit accompanying the reply to the petition for reconsideration and which is also appended to Midlen's application for review: "Kitchen knows full well that my motivation in opposing his Pago Pago application is because he stiffed me for legal fees." Furthermore, Kitchen references Midlen's characterizations, in the application for review, of Kitchen and his conduct, namely, that Kitchen is a "defaulting/reneging/stiffing former client," as evidence of Midlen's motivation for opposing the subject applications. *See* Midlen Application for Review at 3.

8. Midlen contends that after he sought reconsideration of the staff action granting the extension and assignment applications, Kitchen contacted him and threatened to file an ethics complaint with the D.C. Bar if Midlen did not withdraw his challenges to the Pago Pago applications. However, Kitchen denies making a threat and contends that Midlen offered to dismiss the objections if Kitchen agreed to pay outstanding legal fees unrelated to this proceeding. Kitchen asserts that he refused Midlen's offer and told Midlen that, under the circumstances, he would likely file a complaint against Midlen with the D.C. Bar Counsel. Kitchen does not disclose whether he has filed such a complaint, stating only that the rules of the D.C. Bar provide that both the filing of an ethics complaint and the Bar Counsel's investigation of any allegations concerning ethical or disciplinary rule violations are confidential.

9. We have carefully reviewed Midlen's contention that Kitchen threatened to report Midlen's conduct to the D.C. Bar, and that Kitchen thereby abused the Commission's processes. We conclude that no substantial and material question of fact has been raised concerning Kitchen's qualifications to assign his permit to Oceania.

10. We note that Midlen's application for review makes only cursory reference to the merits of the staff's decision granting the extension request and does no more than repeat arguments fully addressed and rejected by the staff. In this regard, Midlen continues to argue that Kitchen failed to meet his burden of demonstrating that, during the relevant construction period, specific circumstances beyond Kitchen's control prevented him from progressing with construction. However, the staff decision denying Midlen's informal objection sets forth the unique difficulties encountered by Kitchen in securing a lease for a transmitter site in American Samoa under the unusual and protracted processes required there, and concludes that delay in progress resulted from circumstances beyond Kitchen's control. Furthermore, the staff noted Kitchen's continuing efforts to negotiate the lease required more than twelve trips to American Samoa. In the denial of Midlen's petition for reconsideration, the staff specifically rejected the argument that a further extension was unjustified in light of Kitchen's decision to stay construction until the conclusion of negotiations concerning the lease for the transmitter site, and specifically distinguished *Panavideo Broadcasting, Inc.*, 6 FCC Rcd 5259 (1991), which Midlen cited in support of his argument. We agree with the staff's analysis. We therefore find no merit in Midlen's reiteration, in his application for review, of the argument that Kitchen has failed to justify his lack of progress as required by *Panavideo*. Furthermore, the Commission has the discretion to evaluate extension requests on a case-by-case basis, and so long as there is no evident disregard for Commission precedent, the staff retains "the flexibility to bring its informed discretion to bear in resolving close cases and accommodating special circumstances." *See New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 365-66 (D.C. Cir. 1987). Midlen has failed to demonstrate that the staff's action disregarded Commission precedent and we agree with the staff's conclusion that Kitchen adequately met his burden of demonstrating that his inability to complete construction was due to circumstances beyond his control. *See* 47 C.F.R. Sec. 73.3534(b)(3).

11. In view of the foregoing, IT IS ORDERED, that, the Motion to Vacate and for Further Reconsideration filed October 21, 1991, by John H. Midlen, Jr. IS DISMISSED

[2] Even assuming *arguendo* that Midlen's pleading constituted a formal opposition such that Kitchen's failure to serve Midlen with pleadings and amendments amounted to a prohibited *ex parte* presentation to the staff, we believe that sanctions would not be appropriate under the circumstances presented. *See* 47 C.F.R. Sec. 1.1216; *Michael L. Glaser, Esq.*, 4 FCC Rcd 4557 (Office of Managing Director 1989).

as moot, and that, pursuant to 47 C.F.R. Sec. 1.115, the application for review filed by John H. Midlen, Jr. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-139

In the Matter of

Amendment of Section 73.202(b), RM-8000
Table of Allotments,
FM Broadcast Stations.
(Rogers City, Michigan)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1992; Released: June 30, 1992

Comment Date: August 21, 1992
Reply Comment Date: September 8, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration a petition for rule making filed by Ives Broadcasting Company ("petitioner") requesting the allotment of FM Channel 260C2 to Rogers City, Michigan, as that community's second FM broadcast service. Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe petitioner's proposal to provide Rogers City with a second FM service warrants consideration. Channel 260C2 can be allotted to Rogers City, Michigan, in compliance with the Commission's Rules at the city reference coordinates.[1] Since Rogers City is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment.

3. In view of the fact that the proposed allotment would provide a second FM service to Rogers City, the Commission believes it is in the best interest of the public to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Rogers City, Michigan	244C2	244C2, 260C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1992,** and reply comments on or before **September 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Gregg P. Skall
Neal J. Friedman
Pepper & Corazzini
1776 K Street, N.W., Suite 200
Washington, D. C. 20006

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 260C2 are 45-25-17 and 83-49-06.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-12

In the Matter of

Amendment of Section 73.202(b), RM-7883
Table of Allotments,
FM Broadcast Stations.
(Belle Fourche, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1992; Released: June 30, 1992

By the Chief, Allocations Branch:

1. At the request of Lovcom, Inc. ("petitioner"), the Commission has before it the *Notice of Proposed Rule Making,* 7 FCC Rcd 886 (1992), proposing the substitution of Channel 240C1 for Channel 240A at Belle Fourche, South Dakota, and the modification of Station KBFS-FM's construction permit to specify operation on the higher class channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 240C1 for Channel 240A at Belle Fourche since it could provide the community with a wide coverage area FM channel and enable Station KBFS-FM to expand its service area. Channel 240C1 can be allotted to Belle Fourche in compliance with the Commission's minimum distance separation requirements with a site restriction of 38.4 kilometers (23.8 miles) south to accommodate petitioner's desired transmitter site.[1] As proposed, we will also modify petitioner's construction permit for Station KBFS-FM to specify operation on the higher class channel.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Belle Fourche, South Dakota	240C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the construction permit of Lovcom, Inc., for Station KBFS-FM, Belle Fourche, South Dakota, IS MODIFIED to specify operation on Channel 240C1, in lieu of Channel 240A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order,* the permittee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, Lovcom, Inc., permittee of Station KBFS-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the change in community of license and/or upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 240C1 at Belle Fourche are North Latitude 44-19-35 and West Longitude 103-50-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-65

In the Matter of

Amendment of Section 73.202(b), RM-7938
Table of Allotments,
FM Broadcast Stations.
(Gladwin, Michigan)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 17, 1992; Released: June 30, 1992

By the Chief, Allocations Branch:

1. In response to a petition filed by Michigan Radio Group, Inc. ("petitioner"), the Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 2269 (1992), proposing the deletion of vacant Channel 280A at Gladwin, Michigan.[1] Petitioner filed comments in support of the proposal. No other comments were received.

2. According to petitioner, licensee of Station WMZX(FM), Owosso, Michigan, deletion of vacant Channel 280A at Gladwin will allow it to increase the operating power of Station WMZX(FM) from three kilowatts to six kilowatts. In support of its request, petitioner states that Channel 280A was allotted to Gladwin in MM Docket 88-620 and made available for application from January 23, 1990 until February 22, 1990. *See* 4 FCC Rcd 8486 (1989). Further, petitioner states that the channel is vacant with no applications on file at the Commission. Petitioner contends that deleting the channel at Gladwin will cause no harm to the Gladwin area, as it will continue to be served by Stations WGDN-FM and WGDN-AM, Gladwin.

3. After consideration of the proposal and comments filed in response to the *Notice*, we have concluded that Channel 280A should be deleted at Gladwin. No comments were received supporting retention of Channel 280A at Gladwin. Further, to date, no applications have been filed with the Commission for the channel at Gladwin. Therefore, we will delete Channel 280A at Gladwin. Deletion of the channel will allow Station WMZX(FM) to increase its power and provide enhanced service to the community of Owosso, Michigan.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Gladwin, Michigan	276A[2]

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] In the event applications were filed, the *Notice* proposed retention of Channel 280A in Gladwin with a site restriction 10.5 kilometers (6.5 miles) west of the community at coordinates 44-00-47 and 84-36-47.

[2] The license for Station KOFM, Channel 276A, was modified in MM Docket No. 89-251 to specify operation on Channel 276C3. *See* 5 FCC Rcd 2152 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-46

In the Matter of

Amendment of Section 73.202(b),	RM-7915
Table of Allotments,	
FM Broadcast Stations.	
(Cloquet, Minnesota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 18, 1992; Released: June 30, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 1913 (1992), issued in response to a petition filed by WKLK, Inc. ("petitioner"), proposing the substitution of Channel 243C3 for Channel 243A at Cloquet, Minnesota. Petitioner also requested modification of its construction permit (BPH-900315MI) for Station WKLK-FM, Channel 243A, to specify operation on Channel 243C3. Petitioner and QB Broadcasting Ltd. filed supporting comments in which they reaffirmed their interest in the channel.[1] No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 243C3 for Channel 243A at Cloquet, Minnesota, since it would provide the community with an additional wide coverage area FM station. The substitution can be made in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site 3.8 kilometers (2.3 miles) east of the community.[2] Since Cloquet is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government has been obtained for this allotment. In addition, we have authorized a modification of the construction permit for Station WKLK-FM, Channel 243A, Cloquet, Minnesota, to specify operation on Channel 243C3, in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **August 14, 1992,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Cloquet, Minnesota	243C3, 263C1

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Station WKLK-FM, Cloquet, Minnesota, IS MODIFIED to specify operation on Channel 243C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

5. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change of community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, QB Broadcasting Ltd., permittee of Station WKLK-FM, is required to submit a rule making fee in addition to the fee required for the applications to effect the upgrade.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] On May 12, 1992, the Commission granted the assignment of the construction permit for Station WKLK-FM from WKLK, Inc. to QB Broadcasting, Ltd. (BAPH-920323HR).

[2] The coordinates for Channel 243C3 are 46-43-20 and 92-25-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-140

In the Matter of

Amendment of Section 73.202(b), RM-8015
Table of Allotments,
FM Broadcast Stations.
(Grants, New Mexico)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1992; Released: June 30, 1992

Comment Date: August 21, 1992
Reply Comment Date: September 8, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Don R. Davis ("petitioner"), requesting the substitution of Channel 264C2 for Channel 265A at Grants, New Mexico, and the modification of Station KZNM's license to specify operation on the higher powered channel. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 264C2 for Channel 265A at Grants since it could enable Station KZNM to expand its coverage area. Channel 264C2 can be allotted to Grants in compliance with the Commission's minimum distance separation requirements at Station KZNM's licensed transmitter site.[1] As requested, we also propose to modify Station KZNM's license to specify operation on Channel 264C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Grants or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Grants, New Mexico	265C2,[2] 279C, 288C	264C2, 279C, 288C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **August 21, 1992,** and reply comments on or before **September 8, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Don R. Davis
733 Roosevelt
Grants, New Mexico 87020
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been

[1] The coordinates for Channel 264C2 at Grants are North Latitude 35-07-09 and West Longitude 107-54-08.

[2] Pursuant to the *Report and Order* in MM Docket No. 89-34, Station KZNM's license was modified from Channel 250C2 to Channel 265C2. *See* 4 FCC Rcd 7849 (1989). However, petitioner's application for Channel 265A specified Class A facilities rather than Class C2 and on March 4, 1992, the Commission so licensed Station KZNM (BLH-910719KB). However, Section 73.202(b) of the Rules, the Table of FM Allotments, has not been editorially amended to reflect the downgrading of Channel 265. Therefore, the proposed amendment to the Table of allotments will be consistent with the Table of Allotments as contained in the October 1991 edition of the Code of Federal Regulations.

served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-591

In re Application of

NANCY NALESZKIEWICZ — File No. 1094-CL-P-430-A-89

For a construction permit to
establish a new cellular system
to operate on Frequency Block A
in the Domestic Public Cellular
Telecommunications Radio service
to serve the Kansas - 3 (Jewell)
Rural Service Area

ORDER

Adopted: June 22, 1992; Released: June 29, 1992

By the Commission:

1. Now before the Commission is the application for review filed on June 4, 1992 by Nancy Naleszkiewicz, in which she requests reversal of the Memorandum Opinion and Order of the Review Board, FCC 92R-38, released May 20, 1992, affirming the hearing officer's denial of a recusal motion. The Common Carrier Bureau filed an opposition on June 10, 1992. We agree with the Board's resolution of this matter.

2. ACCORDINGLY, IT IS ORDERED, that pursuant to 47 C.F.R. § 1.115(g) the application for review filed June 4, 1992 by Nancy Naleszkiewicz IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Ameritech Operating Companies — Transmittal No. 616

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: June 23, 1992; Released: June 26, 1992

By the Acting Deputy Chief (Policy), Common Carrier Bureau:

1. In Transmittal No. 616, Ameritech proposes to create a temporary exemption for certain nonrecurring charges (NRCs) when customers reconfigure their switched access trunks from tandem routed to direct end office routed, or from direct end office routed to tandem routed. To qualify for the exemption, a customer must order a reconfiguration by May 11, 1995, to take effect by November 11, 1995. Ameritech claims that the exemption will facilitate rearrangement of customers' trunks in response to the Commission's local transport rate restructure proceeding and 800 database proceeding.[1] The customer must disconnect one trunk for each trunk installed. D&J at 2. Ameritech asserts that, under the Commission's price cap rules, this is a restructured service rather than a new service. *Id.* at 4 & Exs. 1-4.

2. Allnet Communications Service, Inc. (Allnet) filed a petition to reject or to suspend and investigate Transmittal 616. Allnet first argues that the filing should be rejected because, contrary to Ameritech's claim in the D&J that this is a "restructured service" under the price cap rules, it in fact expands the range of service options, thereby constituting a "new service" under those rules. Allnet notes that Ameritech has made no showing as to an incremental cost floor and a fully distributed cost ceiling as required for a new service. Allnet Petition at 1-2. Allnet further argues that the Commission should suspend and investigate Transmittal 616 because it is premature relative to the 800 database and local transport rate proceedings. Allnet recommends that Ameritech be required to offer a free switch back and a "price guarantee" in case either of these proceedings changes the relative economics of the conversion; alternatively, Allnet suggests that the waiver remain in effect until at least one year following the later of the end of these two proceedings. *Id.* at 3.

3. Finally, Allnet argues that the transmittal should be suspended and investigated because the one-for-one limitation on trunk conversions in either direction is unjust and unreasonable, and discriminates against smaller interexchange carrier (IXC) customers. Allnet notes that such small carriers have a disproportionately small ratio of tandem to end office trunks, making it very difficult to convert from tandem to end office trunks on "an all or none basis," especially with respect to DS 1 channels. Allnet suggests clarifications that tandem/end office switches are to be based on voice grade equivalents and that carriers should be able to route the new end office connections though intermediate hubbing so that they will not be forced to route full DS 1 trunks directly to a single end office. *Id.* at 2-3.

4. Ameritech responds that Transmittal 616 is a restructured service under price caps, rather than a new service, because it does not add any new options relative to existing trunk realignment services. Ameritech Opposition at 2-4. Ameritech further argues that the three-year time limitation on the waiver of NRCs will be sufficient for customers to adjust to the outcome of the 800 database and local transport proceedings and is a clearly defined and easily administered period. *Id.* at 3-5. Ameritech states, however, that it would consider an extension if developments in these proceedings required one. *Id.* at 3-5. Ameritech also states that it will not offer a "price guarantee" *per se*, but that the temporary exemption from NRCs will remain available at least for the three-year period. This would in effect allow a customer to switch back to the previous "price" if, after a trial period, that turned out to be more economical in the first place. *Id.* at 4 n.8.

5. Finally, Ameritech maintains that the offering is not discriminatory against small IXCs because it is not limited to the DS 1 level and conversions may be effected on a "single trunk to single trunk" basis. Ameritech believes that the one-for-one condition will result in easier administration and will confine its waiver to conversions arising out of the two proceedings, rather than to general network growth as well.[2] Ameritech also claims that the offering is not discriminatory because it applies to all IXCs equally, and differences of impact on different carriers due to their individual circumstances does not necessarily constitute unreasonable discrimination. *Id.* at 5-6.

6. The Common Carrier Bureau has reviewed Ameritech's Transmittal 616 and all associated pleadings and submissions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

7. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 616, filed by Allnet Communications Services, Inc., IS DENIED.

[1] Description and Justification (D&J) at 1, *citing:* Transport Rate Structure and Pricing, CC Docket No. 91-213, 6 FCC Rcd 5341 (1991); Provision of Access for 800 Service, CC Docket No. 88-10, 6 FCC Rcd 5421 (1991).

[2] Ameritech has since submitted revisions to Transmittal 616 to clarify the voice grade equivalent basis for such trunk switches. *See* Tariff F.C.C. No. 2., 7th Revised Page 175.1, 6.7.1(C)(4), Transmittal No. 633, filed June 12, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Deputy Chief (Policy)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

National Exchange
Carrier Association, Inc.

Proposed Modifications to the
Interstate Average Schedules

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; Released: June 25, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. This order approves modifications to the average schedule formulas proposed by the National Exchange Carrier Association, Inc. (NECA) on December 31, 1991. The modifications are effective July 1, 1992.

2. Section 69.606(b) of the Commission's rules requires NECA's Board of Directors to propose annual revisions to the average schedules or certify that no revisions are warranted.[1] Section 69.606(a) states that no disbursements shall be made by NECA to average schedule companies without Commission approval.[2] On December 31, 1991, NECA filed proposed modifications to existing average schedule formulas.[3]

3. NTCA, OPASTCO, USTA, and ICORE urge approval of NECA's proposed modifications. MCI questions NECA's cost projections, as well as the proposed CABS formula.[4] ICORE proposes revisions to the 1992 average schedules and to future formulas.

II. DISCUSSION

A. Cost Projections

4. MCI argues that NECA's cost projections are flawed because, by averaging 1990 sample growth rates with 1989 sample growth rates, NECA has not accorded sufficient weight to the declining rates of growth that were exhibited for some accounts in the 1990 sample. In response, NECA states that its forecasting method is the same one that has consistently produced accurate results since 1987.[5] NECA also states that the differences in growth rates between the two samples do not necessarily mean that the rate of growth declined because: (i) different study areas were used in each sample; and (ii) the first sample used Part 31 account data while the second used Part 32 account data.[6]

5. MCI asserts that NECA's cost projections do not fully recognize "their historical downward *trend*."[7] However, one year's data, showing reductions for one year in the growth rates of some accounts, do not provide enough information to conclude that those reductions constitute a trend. This is particularly true when different companies' accounts appeared in each sample, giving rise to sample variance, and the underlying accounting rules, which formed the basis for calculating the growth rates within each sample, changed from the first time period to the second, thereby unavoidably introducing accounting measurement variance.[8]

6. During the last four years NECA's cost growth rate estimates have been very accurate.[9] If a downward trend is developing in the rate of growth of costs, it will be present in the data that NECA must submit by December 31, 1992.[10] The trend would then be incorporated in modifications to the average schedule formulas.[11] As a consequence, NECA's growth rate calculations, and the proposed formulas derived from those calculations, do not require modification at this time.[12]

B. CABS Formula

7. NECA developed a separate CABS formula that will increase the compensation of average schedule companies for CABS service. MCI objects to the increase, stating that the factors that NECA cites for changes in CABS costs (*i.e.*, the introduction of meet point billing, AT&T "takeback" of operator handled recording/routing, and the implementation of equal access)[13] "are not new events" that would justify an increase in CABS compensation.[14]

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[1] 47 C.F.R. § 69.606(b).

[2] 47 C.F.R. § 69.606(a).

[3] Comments were filed by ICORE (a consulting firm), MCI Communications Corporation (MCI), National Telephone Cooperative Association (NTCA), Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO). Reply comments were filed by ICORE, NECA, NTCA, and United States Telephone Association (USTA).

[4] CABS is an acronym for Carrier Access Billing System that, in an average schedule formula context, refers to the interstate revenue requirement that is associated with the preparation of access bills for interstate, interexchange carriers.

[5] NECA Reply at 8-9. NECA states that the actual rate of growth of costs slightly exceeded projections in two out of four study years, was identical to the projection for one of the four study years, and was very slightly below the projection for one year. *Id.* at 9.

[6] The Commission altered account definitions in Part 31 (47 C.F.R. §§ 31.01-1 - 31.707 (1987)) of its rules when it adopted a new system of accounts that is now codified in Part 32 of its rules (47 C.F.R. §§ 32.1-32.9000 (1988)).

[7] MCI Comments at 3 (emphasis supplied).

[8] *See* note 6, *supra*.

[9] *See, e.g.*, NECA Reply at 9, Exhibit A.

[10] *See* 47 C.F.R. § 69.606(b).

[11] *See* 47 C.F.R. § 69.606(a).

[12] MCI questions NECA's removal of study areas that would bias the growth ratio calculations. MCI Comments at 4, n. 9. We have examined the study area data and concluded that NECA did not err in excluding values that were aberrational. *See generally* NECA Proposed Modifications to the Average Schedules (filed Dec. 31, 1991) at V-2 to V-6, Appendices B-1, B-2; Letters from R. Askoff, NECA Attorney, to D. Searcy, Secretary, Federal Communications Commission dated May 26, 1992 and May 29, 1992.

[13] NECA 1992 Proposed Modification of Average Schedules (Dec. 31, 1991) at VII-12.

[14] MCI Comments at 5-6.

8. Although the factors that NECA cites are not "new events" for most purposes, they are new events from the perspective of NECA's average schedule development process. Previous CABS formula filings did not show the effects of meet point billing, AT&T's decision to provide its own recording and routing service on operator assisted calls, and the, implementation of equal access.[15] Given the time lags that are involved in the recordation and verification of reliable data, it was not until the studies for this filing were performed that the effects, noted above, required modification of the formula. We conclude that the concerns raised by MCI are not well founded, and do not warrant rejecting NECA's proposed CABS formula.

C. July 1, 1992 Modifications Suggested By ICORE

9. Although ICORE urges approval of the modified average schedule formulas, ICORE also suggests modifications to those formulas.[16] NTCA, USTA, and NECA oppose ICORE's proposed modifications.[17]

10. First, ICORE contends that Signaling System 7 ("SS7") SP/SSP reimbursement should not be decreased. This contention, however, does not address recent cost information that show lower costs for SS7 equipment.[18] We agree with NTCA that ignoring that cost information in this case "would sacrifice the integrity of the [average schedule revision] process."[19]

11. ICORE also requests direct reimbursement for Line Information Data Base ("LIDB") queries associated with interstate calls. NTCA and NECA oppose ICORE's request, arguing that small exchange carriers do not provide LIDB services, and are not charged for LIDB queries that are initiated by their customers. As a consequence, according to NECA, small exchange carriers do not incur any direct or indirect LIDB expenses. NECA thus concludes that no average schedule settlement mechanism is necessary for LIDB queries. After considering ICORE's comments, and the NTCA and NECA reply comments, we conclude that ICORE has not provided adequate support for this request.

12. In addition, ICORE requests a special settlement procedure for "intertoll switching settlements to companies that have remote switches serving as end offices in host/remote complexes."[20] NECA and NTCA oppose ICORE's request because of the desirability of maintaining simplified monthly data reporting requirements and the complexity of the issues that are involved.[21] NECA states that it has been conducting further studies of intertoll switching settlements, and that it will propose modification of the average schedules if its studies support modification.[22] In our view, NECA's treatment of this subject is the best that can be accomplished at this time. NECA's approach is reasonable and it is unlikely that further improvement will be possible until NECA concludes its studies. Accordingly, we will not attempt to develop or implement a special settlement procedure for intertoll switching at this time.

D. Future Average Schedule Filings.

13. ICORE also includes suggestions for future average schedule formula revisions that involve the inclusion of cost company financial data with average schedule company financial data, additional stratification, and the development of new techniques for compensating average schedule companies that deploy new technologies. Although it is not clear from the record that these suggestions are feasible, in the interest of incorporating any potential improvements that may be possible in future formula revisions, we direct NECA to consider, and include responses to, those suggestions in the next average schedule filing that is made pursuant to § 69.606(b) of the Commission's rules.[23]

E. Conversion of Cost Companies to Average Schedule Settlements Status.

14. Average schedule companies are permitted to convert to cost study status but, after having converted to cost study status, are not permitted to revert to average schedule status without Commission authorization.[24] Between 1984 and 1992, 144 average schedule companies converted to cost study status.[25] ICORE states that the conversions resulted, in large measure, from past infirmities in the average schedules. ICORE suggests that, since those infirmities have been corrected, small cost companies should be permitted to convert to average schedule status.

15. We decline to adopt such an approach here. Under the Commission's rules, an average schedule company is "a telephone company that was receiving average schedule settlements on December 1, 1982," and has been receiving average schedule settlements on a continuous basis since that time.[26] Procedurally, the appropriate vehicle for persons seeking to modify a Commission rule is a petition for rulemaking.

III. CONCLUSION

16. ACCORDINGLY, pursuant to the authority contained in section 0.91 of the Commission's rules, IT IS ORDERED THAT NECA's December 31, 1991 proposed modifications to the interstate average schedules ARE APPROVED with an effective date of July 1, 1992.

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[15] *See, e.g.*, NECA 1991 Modification of Average Schedules (filed Dec. 30, 1990) at VII-24 to VII-28 (as modified by NECA's Jan. 22, 1991 errata), I-16 to I-17.

[16] ICORE Comments at 6-9.

[17] NTCA Reply at 3-6; USTA Reply at 3-4; NECA Reply at 12-18.

[18] *See* NECA Proposed Modifications to the Average Schedules (filed Dec. 31, 1991) at VII-21 to VII-22; Letters from R. Askoff, NECA Attorney, to D. Searcy, Secretary, Federal Communications Commission dated May 26, 1992 and May 29, 1992.

[19] NTCA Reply at 4.

[20] ICORE Comments at 9.

[21] NECA Reply at 16-18; NTCA Reply at 5-8.

[22] NECA Reply at 17-18, NTCA Reply at 5-6.

[23] 47 C.F.R. § 69.606(b).

[24] *See generally* MTS/WATS Market Structure: Average Schedule Companies, 103 FCC 2d 1017, 1026-27 (1986); In the Matter of NECA's Proposed Waiver of Section 69.605(c) of the Commission's Rules, 2 FCC Rcd 3960-61 (1987); 47 C.F.R. § 69.605(c).

[25] *See* NECA Reply, Attachment 1.

[26] 47 C.F.R. § 69.605(c).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 30, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON TELEPHONE UTILITIES OF THE NORTHLAND, INC. PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On June 11, 1992, Telephone Utilities of the Northland, Inc. (TUNI) filed a petition for waiver of the equal access implementation requirements for independent telephone companies. TUNI requests an additional six months to complete the conversion of its Kodiak Base central office to equal access. According to TUNI, on June 5, 1989, General Communications Incorporated (GCI) requested that TUNI convert its end offices to equal access. Pursuant to Commission order, TUNI is required to complete the equal access conversion of its end offices equipped with stored-program-controlled (SPC) switches within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, Report and Order, 100 FCC 2d 860 (1985). The three-year time period ended on June 5, 1992. TUNI seeks an additional six months, until December 1992, to complete its equal access conversion.

TUNI states that at the time of GCI's request, TUNI was involved in discussions with the U.S. Coast Guard (USCG) regarding USCG's desire to relocate the existing Kodiak Base central office switch. TUNI states that the relocation of the Kodiak Base central office involved the purchase and installation of a new switch and that equal access conversion would be accomplished through the new switch. TUNI states that it entered into a special contract with USCG whereby TUNI would provide Digitrex (central office-based switching) services to the USCG via a DMS-100 switch and recovery of certain costs associated with the DMS-100 would be allocated between the equal access and Digitrex functions performed by the switch. TUNI states that, based on the contract with USCG, it ordered the new switch.

TUNI states that in September 1991, the USCG notified TUNI that the contract was invalid because the USCG person signing the contract was not authorized to do so. TUNI states that it interrupted installation of the new switch until the contract dispute can be settled. TUNI states that it is important to resolve the issue of whether TUNI will receive revenues from the Digitrex service since installation of the new switch solely for the purpose of providing equal access would not be economically feasible. TUNI states that it has been involved in ongoing discussions with USCG regarding the validity of the contract and other viable options for equal access implementation. TUNI adds that it notified the interexchange carriers of the delays in equal access implementation.

Interested parties should file comments on the petition by **July 20, 1992**, and reply comments by **August 4, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. §§ 1.1200-1.1216. For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LONG DISTANCE SERVICE OF WASHINGTON, INC., Complainant,

v.

BELL TELEPHONE OF PENNSYLVANIA,	File No. E-90-287
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-288
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-289
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-290
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-291
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-292
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-293
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-294
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-295
OHIO BELL TELEPHONE COMPANY,	File No. E-90-296
NEW YORK TELEPHONE COMPANY,	File No. E-90-297
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-298
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-299
SOUTH CENTRAL BELL TELEPHONE COMPANY, and	File No. E-90-300
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, Defendants.	File No. E-90-301

ORDER

Adopted: June 22, 1992; Released: July 1, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Long Distance Service of Washington, Inc. (LDS), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that LDS presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those pro-

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does LDS in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, (Com.Car.Bur. 1992).

ceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. LDS's damages claims rest primarily on the contention that the proper measure of the damages it has suffered as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. The majority of defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant. In addition, some defendants maintain that the relevant rate of return is each operating company's overall rate of return, not each access category rate of return.[10] Some defendants maintain that they must be allowed to offset overearnings in individual access categories with underearnings in access categories.[11] The majority of defendants contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12] One defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to LDS since LDS would not flow through such damages to its own customers.[13]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which LDS may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with LDS, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violation could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or sup-

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[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] LDS also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by the defendants in response to LDS's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they were part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,034 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] The Ameritech defendants contend that the relevant rate of return is the overall rate of return of Ameritech in the aggregate. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[11] *See, e.g.*, New England Telephone and Telegraph Company Answer and Motion to Dismiss at 3.

[12] *See, e.g.*, Bell Atlantic Joint Answer and Motion to Dismiss at 3.

[13] Pacific Bell Motion to Dismiss at 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

port their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that LDS's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding LDS's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute LDS's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELAMARKETING INVESTMENTS, LTD.,
Complainant,

v.

GTE NORTH INCORPORATED,	File No. E-91-120
THE LINCOLN TELEPHONE & TELEGRAPH COMPANY,	File No. E-91-121
THE OHIO BELL TELEPHONE COMPANY, and	File No. E-91-122
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-91-123

Defendants.

ORDER

Adopted: June 22, 1992; Released: July 1, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Telamarketing Investments, Ltd. (TMI), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that TMI presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. TMI's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order), recon. denied,* 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order), appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does TMI in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia,* a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Some defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant when their overall interstate rates of return were below the authorized level.[10] Some defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories. Defendants contend that an award of damages based on the measure advocated by the complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. Some defendants argue that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to TMI since TMI would not flow through such damages to its own customers.[11]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which TMI may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with TMI, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that TMI's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding TMI's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute TMI's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein.

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[7] TMI also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to TMI's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Additionally, The Ohio Bell Telephone Company and GTE North Incorporated contend that the relevant overall interstate rate of return is that of the Ameritech Operating Companies and the GTOCs in the aggregate, respectively, not each of their component operating companies. The Commission previously addressed and rejected this argument. *See, e.g., AT&T Liability Order*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in this proceeding.

[11] *See, e.g.*, Answer and Affirmative Defenses of the Lincoln Telephone and Telegraph Company at para. 15 (filed January 15, 1992). We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[12]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[12] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

HERITAGE CABLEVISION ASSOCIATES
OF DALLAS, L.P., and
TEXAS CABLE TV ASSOCIATION, INC.
Complainants,

v. File No. PA-89-002

TEXAS UTILITIES ELECTRIC COMPANY
Respondent.

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; Released: June 30, 1992

By the Commission:

I. INTRODUCTION

1. In this order, we dismiss petitions for reconsideration of the *Memorandum Opinion and Order* ("*MO&O*") in this complaint proceeding.[1]

II. BACKGROUND

2. In our *MO&O*, we granted a pole attachment complaint filed pursuant to Section 224 of the Communications Act by TCI Cablevision of Dallas, Inc. ("TCI") and its predecessors against Texas Utilities Electric Co. ("TU Electric").[2] TCI, the franchised cable operator in Dallas, provides both traditional (*i.e.*, video) and nontraditional (*i.e.*, data) services on a "commingled" basis over a single network within its cable franchise area.[3] In the *MO&O*, the Commission concluded that "Section 224 protects TCI's pole attachments within its franchised service area which support equipment employed to provide nonvideo services in addition to video and other traditional cable television services," and that "TU Electric's imposition of a separate charge for TCI's cable system pole attachments for nontraditional services violates section 224's prohibition against unjust and unreasonable pole attachment rates, terms and conditions."[4]

3. Two non-parties to this adjudication seek reconsideration of the Commission's decision. The United States Telephone Association ("USTA") filed a petition for reconsideration on December 30, 1991, asking the Commission to reconsider certain aspects of the decision and to clarify additional issues not raised by the parties to the complaint proceeding.[5] Additionally, Monongahela Power Company, the Potomac Edison Company and West Penn Power Company (collectively, the "APS Operating Companies") moved the Commission on February 18, 1992, for leave to intervene in the proceeding to file a petition for reconsideration.[6]

III. DISCUSSION

4. For reasons set forth below, we dismiss both petitions for reconsideration on procedural grounds.

A. The United States Telephone Association's Petition

5. Section 1.106 of our rules sets forth the requirements that parties and other interested persons must satisfy to seek reconsideration of a final Commission action. 47 C.F.R. § 1.106 (1991). Subsection (b)(1) of that rule provides in pertinent part that persons seeking reconsideration of a Commission action who are not already parties to the proceeding must "show good reason why it was not possible for [them] to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1) (1991).[7] As the United States Court of Appeals for the District of Columbia Circuit recently noted, "[u]nderlying these regulations are principles of finality and exhaustion of administrative remedies: Interested persons seeking to participate in FCC proceedings are required to join the proceedings at the earliest opportunity."[8] Accordingly, a petition for reconsideration filed by a non-party which does not demonstrate good reason for the petitioner's failure to participate earlier will be dismissed as inconsistent with Section 1.106(b)(1).[9]

6. USTA did not seek to intervene in this proceeding prior to the Commission's ruling in the *MO&O* and thus is not a party to the adjudication. Moreover, USTA did not seek to participate as *amicus*, unlike another non-party, Metropolitan Fiber Systems, Inc. ("MFS"), which requested and obtained permission to file an *amicus* brief.[10] Therefore, in order to seek reconsideration under Section 1.106(b)(1), USTA must demonstrate "good reason" why it was "not possible" for it to participate at an earlier stage in this proceeding.

7. We conclude that USTA has failed to make the requisite showing under Section 1.106(b)(1). The record indicates that USTA had actual notice of the pendency of this complaint well before the Commission issued its decision and yet failed to attempt to participate either as an intervenor or *amicus*. In its petition, for example, USTA states that it was "unaware that this action was pending before the Commission *until after the pleading cycle was completed*."[11] This statement falls well short of the showing necessary to demonstrate an inability to participate prior to the Commission's disposition of the complaint. Like MFS, USTA could have moved the Commission for leave to participate, either as *amicus* or intervenor, after the pleading cycle closed.[12] Given its actual knowledge of this proceeding prior to issuance of the *MO&O*, USTA has not justified its failure to attempt to participate earlier.[13]

8. Despite the procedural infirmities of its petition, USTA maintains that the public interest would be served by considering its petition. We disagree. In the *MO&O*, we interpreted Section 224 as it applies to TCI within the specific factual context presented by the complaint. While our jurisdictional analysis may serve as precedent for future cases involving other factual situations, USTA or other entities may seek to participate in any such future adjudications in a timely fashion and raise any jurisdictional arguments at that time. Accordingly, USTA's petition for reconsideration is dismissed.

B. The APS Operating Companies' Motion and Petition

9. Section 405 of the Communications Act provides that "[a] petition for reconsideration must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." 47 U.S.C § 405.[14] Public notice of the *MO&O* was given on November 29, 1991, the date of its release. 47 C.F.R. § 1.4(b)(2) (1991). Thus, pursuant to Section 405, petitions for reconsideration of the *MO&O* were due no later than December 30, 1991. The APS Operating Companies, however, did not file their petition for reconsideration until February 18, 1992, considerably beyond the statutory deadline. As we have noted previously, except where the Commission fails to provide notice of its decision to parties as required by its rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405.[15] Therefore, we dismiss the APS Operating Companies' untimely petition for reconsideration and dismiss their accompanying motion for leave to intervene as moot.

IV. CONCLUSION

10. We dismiss USTA's petition for reconsideration because it does not demonstrate "good reason" for USTA's failure to participate earlier in this proceeding as required by Section 1.106(b)(1) of our rules. We dismiss the APS Operating Companies' petition for reconsideration for failure to comply with the statutory 30-day filing period specified in Section 405 of the Communications Act and dismiss their accompanying motion for leave to intervene as moot.

V. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and Section 1.106(b)(1) of the Commission's rules, 47 C.F.R. § 1.106(b)(1), that the petition for reconsideration filed by the United States Telephone Association on December 30, 1991, IS DISMISSED.

12. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and 405 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 405, and Section 1.106(f) of the Commission's rules, 47 C.F.R. § 1.106(f), that the motion for leave to intervene and the accompanying petition for reconsideration filed by Monongahela Power Company, the Potomac Edison Company and West Penn Power Company on February 18, 1992, ARE DISMISSED.

13. IT IS FURTHER ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that the motions for leave to intervene filed by the National Cable Television Association, Inc. and the Community Antenna Television Association, and Continental Cablevision, Inc., on January 14, 1992, ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *Heritage Cablevision Associates of Dallas, L.P., et al. v. Texas Utilities Electric Company*, 6 FCC Rcd 7099 (1991), *petition for review docketed sub nom. Texas Utilities Electric Company v. FCC*, No. 92-1032 (D.C. Cir. filed Jan. 24, 1992).

[2] Section 224 of the Communications Act, 47 U.S.C. § 224, empowers the Commission to adjudicate disputes between cable television system operators and telephone and electric utilities concerning alleged unjust and unreasonable pole attachment rates, terms and conditions.

[3] *MO&O*, 6 FCC Rcd at 7101 n.18 and 7104 n.39.

[4] *Id.*, 6 FCC Rcd at 7107, para. 39.

[5] TCI opposed USTA's petition for reconsideration. In addition, the National Cable Television Association, Inc. and the Community Antenna Television Association, as well as Continental Cablevision, Inc., moved the Commission for leave to intervene in opposition to USTA's petition. The opposing pleadings advance both procedural and substantive objections to the USTA filing.

[6] TCI opposed the APS Operating Companies' motion and petition for reconsideration on procedural grounds.

[7] *See also* 47 C.F.R. § 1.115(a) (1991) (similar "good reason" requirement for non-parties seeking to file applications for review).

[8] *United Church of Christ v. FCC*, 911 F.2d 803, 808 (D.C. Cir. 1990) (citations omitted).

[9] *See, e.g., Fleet Call*, 6 FCC Rcd 6989 (1991); *Whidbey Broadcasting Service, Inc.*, 4 FCC Rcd 8726 (1989) (affirming Mass Media Bureau's dismissal of petition for reconsideration under § 1.106(b)(1)); *Ted Tucker and Jana Tucker*, 4 FCC Rcd 2816 (1989); *University of North Carolina*, 4 FCC Rcd 2780 (1989); *Press Broadcasting Company*, 3 FCC Rcd 6640 (1988), *aff'd on other grounds sub nom. United Church of Christ v. FCC*, 911 F.2d 803 (D.C. Cir. 1990); *Monterey Peninsula TV Cable*, 98 FCC 2d 1281 (1984); *Concord Telephone Exchange, Inc.*, 56 RR 2d 653 (1984); *Community Cable TV, Inc.*, 98 FCC 2d 1180 (1984); *Simon Geller*, 91 FCC 2d 1253 (1982), *aff'd in relevant part, remanded in part sub nom. Committee for Community Access v. FCC*, 737 F.2d 74 (D.C. Cir. 1984); *American Telephone & Telegraph Co.*, 46 FCC 2d 878 (1974).

[10] *MO&O*, 6 FCC Rcd at 7101 n.13.

[11] USTA Petition at 2 (emphasis added).

[12] Moreover, in its opposition to USTA's petition, TCI states that its counsel personally informed counsel for one of USTA's members of the pendency of this complaint on July 23, 1990. TCI Opposition at 11. In reply, USTA makes no attempt to rebut TCI's claim that it had actual knowledge of the complaint and states only that the public interest would be served by hearing USTA's different view of the law. USTA Reply at 1-2.

[13] USTA further attempts to justify its earlier nonparticipation by observing that public notice of the complaint was not given and asserting that the Commission's policy is to discourage the participation of non-parties in complaint proceedings. USTA Petition at 2. These arguments are not persuasive. While the Commission typically does not give public notice of pole attachment complaints, as noted above, USTA had actual knowledge of the complaint with ample time to seek leave to intervene or participate as *amicus*. The Commission, in fact, granted the motion of a non-party (MFS) for leave to file an *amicus* brief in this proceeding. USTA was free to seek similar consideration from the Commission.

[14] *See also* 47 C.F.R. § 1.106(f) (1991) (implementing the 30-day filing period specified in Section 405).

[15] *See Virgin Islands Telephone Corporation, Order*, FCC 92-265, para. 3 (released June 19, 1992); *Mary R. Kupris*, 5 FCC Rcd 5142, para. 2 (1990) (citing *Reuters Ltd. v. FCC*, 781 F.2d 946, 951-52 (D.C. Cir. 1986); *Gardner v. FCC*, 530 F.2d 1086 (D.C. Cir. 1976); *Richardson Independent School District*, 5 FCC Rcd 3135 (1990)), *vacated and remanded on other grounds sub nom. WLOS TV, Inc. v. FCC*, 932 F.2d 993 (D.C. Cir. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

Associated Paging and
Telephone, Inc.

Notice of Apparent Liability
for Forfeiture Penalty for
Station WNNG542 in
the Private Land Mobile
Business Radio Service
at Ben Bolt, TX

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 1, 1992; Released: July 1, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against Associated Paging and Telephone, Inc., a licensee in the Commission's Private Land Mobile Business Radio Service, call sign WNNG542. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna structures. 47 C.F.R. Sections 17.27, 17.48(a).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located near Ben Bolt, Texas, at latitude N-27-39-04, longitude W-098-02-30 on August 18 and 19, 1991. The inspection disclosed that the middle beacon and a sidelight located three-fourths of the way up the antenna were not operating. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the lights were extinguished. The Commission's records show that Associated is licensed to operate a radio transmitter from that antenna structure.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.27 of the Commission's rules sets forth requirements for the lighting of antenna structures within a certain height range. The tower here at issue fell within that range, but was not fully lighted so as to be in compliance with section 17.27. *See* 47 C.F.R. Section 17.27. In addition, section 17.48(a) of the rules requires a licensee to notify the Federal Aviation Administration where tower lights function improperly or are extinguished, which Associated failed to do. *See* 47 C.F.R. Section 17.48(a). Associated, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of the tower and requiring that the FAA be notified if lights malfunction.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *See Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212; 57 Fed. Reg. 24986; June 12, 1992; the base amount of a monetary forfeiture penalty for failure by a private land mobile licensee to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that Associated Paging and Telephone, Inc. is APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that Associated Paging and Telephone, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to Associated Paging and Telephone, Inc., P.O. Box 9741, Corpus Christi, Texas 78469.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

K. Haunschild

Notice of Apparent Liability
for Forfeiture Penalty for
Station KNHC532 in the
Private Land Mobile Business
Radio Service
at Ben Bolt, TX

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Adopted: June 1, 1992; Released: July 1, 1992

By the Commission:

1. This Notice of Apparent Liability for a monetary forfeiture penalty initiates enforcement action against K. Haunschild, a licensee in the Commission's Private Land Mobile Business Radio Service, call sign KNHC532. A monetary forfeiture penalty of $8,000 is set forth for apparent willful and repeated violations of the Commission's rules relating to the lighting of radio antenna structures. 47 C.F.R. Sections 17.27, 17.48(a).

2. The Commission's Kingsville, Texas Office inspected a radio antenna structure located near Ben Bolt, Texas, at latitude N-27-39-04, longitude W-098-02-30 on August 18 and 19, 1991. The inspection disclosed that the middle beacon and a sidelight located three-fourths of the way up the antenna were not operating. The inspection further revealed that the Federal Aviation Administration's Flight Service Station had not been notified that the lights were extinguished. The Commission's records show that K. Haunschild is licensed to operate a radio transmitter from that antenna structure.

3. Section 303(q) of the Communications Act of 1934, as amended, gives the Commission authority to regulate the illumination of radio towers. Section 17.27 of the Commission's rules sets forth requirements for the lighting of antenna structures within a certain height range. The tower here at issue fell within that range, but was not fully lighted so as to be in compliance with section 17.27. *See* 47 C.F.R. Section 17.27. In addition, section 17.48(a) of the rules requires a licensee to notify the Federal Aviation Administration where tower lights function improperly or are extinguished, which K. Haunschild failed to do. *See* 47 C.F.R. Section 17.48(a). K. Haunschild, therefore, appears to have willfully and repeatedly violated the Commission's rules prescribing the lighting of the tower and requiring that the FAA be notified if lights malfunction.

4. It is the Commission's policy to hold each Commission licensee on a tower individually responsible for complying with the Commission's rules relating to radio antenna towers, and this applies even if the licensee does not own or control the tower, or has contracted with another person to maintain the tower. *See Deregulation - Land Mobile Radio*, 69 FCC 2d 1612, 1617 n. 3 (1978). A licensee may not delegate its obligation to comply with the Commission's antenna rules to another person. *Review of Liability of MTD*, 6 FCC Rcd 34; 68 RR 2d 989 (1991). Failure to comply with the FCC's antenna rules is an especially serious matter "because of the potential dangers to aviation created by such violations." *Radio Beaumont*, 13 FCC 2d 965, 966 (1968).

5. The Commission's authority to issue Notices of Apparent Liability and to impose monetary forfeiture penalties is contained in Section 503(b) of the Communications Act of 1934. 47 USC Section 503(b). Pursuant to our *Policy Statement in the Matter of Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212; 57 Fed. Reg. 24986; June 12, 1992; the base amount of a monetary forfeiture penalty for failure by a common carrier to comply with the Commission's rules regarding the lighting of an antenna tower is $8,000. No adjustments appear warranted in this case.

6. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 USC Section 503(b), and Section 1.80 of the Commission's rules, 47 C.F.R. Section 1.80, that K. Haunschild, Inc. is APPARENTLY LIABLE FOR A FORFEITURE of Eight Thousand Dollars ($8,000) for willful and repeated violations of the above rules. The amount of the forfeiture specified was determined after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934 as amended.

7. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. Section 1.80(f)(3), that K. Haunschild shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. Payment should be mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

If you wish to file a written response regarding why the forfeiture should be reduced or not be imposed, please send it to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Attention: Notice of Apparent Liability Response
Room 744
1919 M Street, NW
Washington, D.C. 20554

8. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for a Monetary Forfeiture Penalty shall be sent by certified mail, return receipt requested, to K. Haunschild, P.O. Box 1553, Kingsville, Texas 78363.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 92-137

In the Matter of

Amendment of Section 22.521(b) of the Commission's Rules to amend the table of assignments for air-ground stations in the Public Mobile Service. RM-7859

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1992; Released: July 1, 1992

By the Commission:

1. On October 18, 1991, Schaller Telephone Company (STC) filed a Petition for Rule Making (RM-7859) requesting the allocation of working channel 3 (454.850 MHz) to Schaller, Iowa. Schaller is in Sac county in northwest Iowa, south of the Storm Lake Recreation Region, about 57 miles east of Sioux City and 105 miles northwest of Des Moines.

2. Air-ground radiotelephone service is a public radio service between a base station and airborne mobile stations. In creating the air-ground service, the Commission established the goal of encouraging the provision of nationwide service utilizing the minimum amount of spectrum necessary. The Commission recognized that its allocation of 12 air-ground channels would permit nationwide service if the channels were used in sufficiently separate geographic areas. *Air - Ground Service*, 22 FCC 2d 716 (1969).

3. STC states in its petition that the allocation of channel 3 to Schaller, Iowa would allow for air-ground communications for planes using Storm Lake Municipal Airport[1] as well as those in transit between Sioux City and Fort Dodge.

4. In view of the apparent need for air-ground communications service in the Schaller, Iowa area, and since STC's proposal meets our minimum distance standards for co-channel separation, the Commission proposes to amend 47 C.F.R. Section 22.521(b) to assign channel 3 to Schaller, Iowa as set forth in the Appendix to this Notice.

PROCEDURAL MATTERS

5. The Commission invites comments on this proposal. The procedures to be followed in submitting comments in this proceeding are similar to those followed in proceedings to amend the FM or Television Table of Assignments in Section 1.420 of the Commission's rules. The procedures are discussed below.

6. *Cut-off procedures*. The following procedures govern the consideration of filings in this proceeding:

(a) Counterproposals made in this proceeding will be considered if they are made in initial comments so that parties may comment on them in reply comments. Counterproposals will not be considered if made in reply comments (*See* Section 1.420(d) of the Commission's rules).

(b) Petitions for Rule Making which conflict with the proposal of this Notice will be considered as comments. Public notice of such treatment will be given so long as the petitions are filed before the date for filing initial comments. If they are filed after that date, they will not be considered in connection with the decision in this proceeding.

7. *Dates and service*. Under the procedures set out in Sections 1.415 and 1.420 of the Commission's rules, interested parties may file comments on or before **August 21, 1992** and reply comments on or before **September 7, 1992.** All submissions made by parties to this proceeding or on behalf of such parties must be made in written comments, reply comments or other appropriate pleadings. These comments and reply comments must be accompanied by a certificate of service (*See* Section 1.420(a)--(c) of the Commission's rules). Reply comments must be served on the person(s) who filed comments.

8. *Number of copies*. Under Section 1.420 of the Commission's rules, an original and four copies of all comments, reply comments, pleadings, briefs or other documents must be submitted to the Commission.

9. *Public inspection of filing*. All findings made in this proceeding are available for inspection during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street, N.W., Washington, D.C.

EX PARTE

Ex Parte Rules - Non-Restricted Proceeding

10. This is a non-restricted notice and comment Rule Making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203 and 1.1206(a).

REGULATORY FLEXIBILITY ACT.

11. We certify that the Regulatory Flexibility Act does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq* (1981).

ORDERING CLAUSES

12. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. Sections 151, 154(i), 154(j) and 303(r), that a NOTICE OF PROPOSED RULE MAKING IS ISSUED, proposing amendment of 47 C.F.R. Section 22.521(b) as set forth in the Appendix below.

13. IT IS FURTHER ORDERED that the Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Proposed Rule Changes:

Part 22 of Title 47 of the C.F.R. is proposed to be amended as follows:

1. The authority citation for Part 22 continues to read as follows:

AUTHORITY: Secs. 4, 303, 48 Stat. 1066, 1083, as amended; 47 U.S.C. 154,303.

2. Section 22.521 is amended by adding a location and channel in the table in paragraph (b) for Schaller, Iowa to read as follows:

22.521 Air-ground radiotelephone service.

* * * * *

(b) * * *

Location	Channel
* * *	
Indiana: Vincennes	11
Iowa:	
Schaller	3
Waterloo	12
Kansas:	
Colby	9, 11
Salina	1
* * *	

* * * * *

FOOTNOTE

[1] STC cites a survey by the Iowa Department of Transportation showing approximately 9,000 general avaiation departures/arrivals at Storm Lake in 1989. STC also conducted its own survey among general aviation interests and found a significant interest in local air-ground communications service.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 1, 1992

CERTIFIED MAIL NO. P 295 670 781
RETURN RECEIPT REQUESTED

Robert W. Healy, Esq.
Smithwick & Belendiux, P.C.
2033 M Street, N.W.
Suite 207
Washington, D.C. 20036

Re: Notice of Forfeiture issued to Rio Grande Transmission, Inc., on November 19, 1991.
3153402-91001
3153402-91002
3153402-91003
3153402-91004

Dear Mr. Healy:

This is in response to your Motion for Cancellation or Remission of Forfeiture dated December 19, 1991. You requested cancellation or reduction of $8,000 in monetary forfeiture penalties that had been assessed against Rio Grande Transmission, Inc., 5000 Plaza on the Lake, Suite 100, Austin, TX, by the Federal Communications Commission's (FCC) Denver Office.

We are treating your request as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106. As explained below, the monetary forfeiture penalties are reduced to $3,200, and this penalty is affirmed.

Our records show that on May 15, 1991, an FCC inspector visited two radio antenna tower structures. The first was located at coordinates N36-01-18 W104-42-09 near Wagon Mound, New Mexico. The second was located at N35-46-07 W104-57-26 near Watrous, New Mexico. One tower had 10 cables (waveguides) mounted on one side and the other had 8 cables (waveguides) and a UHF cable located on one side. These cables were spaced across the face of one side of the towers and effectively covered an entire side of the towers. The cables were not painted with aviation orange and white bands, and obstructed the visibility of the towers which were painted with orange and white bands. From a distance of about one quarter mile, the sides of the towers where the cables were mounted were not clearly visible. FCC records reflected that Rio Grande Transmission was licensed on the Wagon Mound tower to operate two radio transmitters (call signs WNKG 873 and WLN 420) and on the Watrous tower to operate two radio transmitters (call signs WLN919 and WNKP745).

On June 3, 1991, the FCC's Denver Office mailed Official Notices of Violation (FCC Form 793) to Rio Grande Transmission, Inc. The Notices stated that Rio Grande Transmission had violated Section 17.50 of the FCC's rules because the cables on the towers adversely affected the visibility of the towers which created a hazard to air navigation, and that the cables must be painted or placed on the tower in a manner that did not affect visibility. 47 C.F.R. Section 17.50. Rio Grande Transmission responded on June 13 and July 19, 1991. On October 11, 1991, the FCC's Denver Office issued to Rio Grande Transmission four Notices of Apparent Liability for monetary forfeiture penalties for violating Section 17.50 of the FCC's rules. A separate Notice was issued for each of the FCC licenses that Rio Grande Transmission held on the Wagon Mound and Watrous towers.

Section 17.50 of the FCC's rules provides that "towers shall be cleaned or repainted as often as necessary to maintain good visibility." Furthermore, Section 17.21 of the rules requires towers over 200 feet in height to be painted. 47 C.F.R. Section 17.21. Sections 17.22 and 17.23 specify how towers should be painted. 47 C.F.R. Section 17.22 and 17.23.

On October 18, 1991, the FCC's Denver Office wrote Rio Grande Transmission providing additional information concerning the Notices of Apparent Liability. On November 11, 1991, Rio Grande Transmission responded by separate letter to each of the Notices of Apparent Liability. The FCC's Denver Office then issued on November 19, 1991, a Notice of Forfeiture for a $8,000 monetary forfeiture penalty to Rio Grande Transmission. The Notice stated that the penalty for each of the four violations was $2,000, and, therefore, the total monetary forfeiture penalty was $8,000. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act of 1934. 47 U.S.C. Section 503(b).

Rio Grande Transmission in its Motion for Cancellation or Remission of Forfeiture stated several reasons to support its position. First, Rio Grande Transmission claims that Section 17.50 of the FCC's rules was not violated since the towers, themselves, were properly painted, and Section 17.50 only pertains to the painting of towers and not to cables attached to towers. The FCC's rules, therefore, do not prohibit the use of unpainted cables on towers even if they obstruct the view of the tower, according to Rio Grande Transmission. The FCC's rules, however, define the term radio antenna tower structure to include anything that is part of or attached to a tower such as cables. Section 17.2 states that "The term antenna structures includes the radiating and/or receive system, its supporting structures and any appurtenances mounted thereon." 47 C.F.R. Section 17.2(a). Cables attached to a tower, therefore, may not obstruct the view of a tower, and if they do, steps must be taken such as painting the cables to enhance the visibility of the tower structure.

Second, Rio Grande Transmission argues that "in mitigation, Rio Grande . . . immediately upon receipt of the Notice of Apparent Liability . . . consulted with the staff of the Commission . . . and attempted to set up a meeting with the Field Operating Bureau to discuss the matter." However, remedial action to correct a violation, although commendable, does not nullify a forfeiture penalty. *E.g., Station KGVL, Inc.*, 42 FCC2d 258, 259 (1973); *Executive Broadcasting Corp.*, 3 FCC2d 699, 700 (1966).

Third, Rio Grande Transmission complains that "Repeated requests" for a meeting with the FCC's Field Operations Bureau "went unanswered." However, the violations had already occurred, and Notices of Apparent Liability had been issued which offered Rio Grande Transmission "an opportunity to show, in writing, why the forfeiture should be reduced or not imposed." This procedure complied with Section 1.80(f)(3) of the FCC's rules regarding the imposition of forfeitures. 47 C.F.R. Section 1.80(f)(3). Furthermore, notes in the enforcement file reflect that Rio

Grande Transmission discussed the violations with FCC personnel in the Denver Office and the Field Operations Bureau in Washington, D.C., and that Rio Grande Transmission's main concern was to seek advice regarding how it could remedy the violations without painting the cables or taking them down.

Fourth, Rio Grande Transmission explains that it "submitted a proposed tower sketch . . . in its application . . . which fully advised the Commission of the type of waveguide to be used. This placed the Commission on notice of Rio Grande's intent to construct in the manner for which the forfeiture is now to be assessed." The monetary forfeiture penalty was not imposed because of the manner in which the tower was constructed, but because of a failure to paint the waveguides as required by the FCC's rules and the license issued by the FCC.

Fifth, Rio Grande Transmission states by quoting from its July 19, 1991, letter "that the waveguide cannot be painted because the paint will not adhere to the elliptical waveguide." However, Rio Grande Transmission in its November 11, 1991, letter states that it "will move forward and attempt to paint the waveguides . . . ." Thus, it appears that Rio Grande Transmission believed in November that it might be possible to paint the waveguides and there is no indication that this attempt failed. The FCC's rules, moreover, authorize towers to use high intensity obstruction lighting instead of paint. 47 C.F.R. Section 17.23.

Finally, Rio Grande Transmission objects to the FCC issuing two monetary forfeiture penalties for each tower based on Rio Grande Transmission holding two FCC licenses at each tower. One of the two penalties for each tower is canceled. The total monetary forfeiture penalty, therefore, is reduced from $8,000 to $4,000.

The FCC's *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695, 69 RR2d 823 (1991), *modified in part on reconsideration*, FCC 92-212 (May 14, 1992), specifies certain factors that the FCC may consider as "downward adjustment criteria" to reduce monetary forfeiture penalties. Taking these factors into consideration, especially lack of evidence regarding past noncompliance with the FCC's rules, the total penalty is further reduced from $4,000 to $3,200.

Please request your client to submit two $1,600 monetary forfeiture payments within 30 days of the receipt of this letter. Payment may be by check or money order payable to the Federal Communications Commission. The number 3153402-91001 should be placed on one check, and the number 3153402-91002 on the second check. The forfeitures numbered 3153402-91003 and 3153402-91004 are canceled. The two checks for $1,600 each should be mailed to:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

Forfeiture penalties not paid within 30 days may be recovered by the U.S. Attorney in a civil suit. 47 U.S.C. Section 504(a).

Sincerely,

Richard M. Smith
Chief, Field Operations Bureau

cc: Rio Grande Transmission, Inc.
5000 Plaza on the Lake, Suite 100
Austin, Texas 78746

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

PACIFIC GATEWAY EXCHANGE, INC. File No. I-T-C-92-108

Application for authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for the provision of common carrier services between the United States and the Philippines

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 22, 1992; Released: July 1, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the public convenience and necessity require Pacific Gateway Exchange, Inc.'s (PGE) acquisition and operation of the requested facilities for the provision of private line and switched voice services between the U.S. and the Phillipines,[1] and for the provision of INTELSAT Business Service.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-92-108 IS GRANTED, and PGE is authorized to:[2]

a. lease from Comsat and operate six 64-kbps satellite circuits between the Jamesburg, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Philippines furnished by PGE's correspondent in the Philippines;

b. lease from AT&T and operate six 64-kbps circuits in the Jamesburg, California earth station;

c. lease and operate appropriate connecting facilities between the Jamesburg, California earth station and PGE's operating center in Los Angeles, California;

d. use the facilities in a, b and c above to provide international private line and switched voice services between the United States and the Philippines;

e. lease from IDB International and operate six 64-Kbps satellite circuits between the Culver City, California earth station and an appropriate INTELSAT satellite over the Pacific Ocean, connecting with similar circuits between the satellite and an earth station in the Philippines furnished by PGE's correspondent in the Philippines;

f. lease from IDB International and operate six 64-kbps circuits in the Culver City, California earth station;

g. lease and operate appropriate connecting facilities between the Culver City earth station and PGE's operating center in Los Angeles, California; and

h. use the facilties in e, f and g above to provide IBS and associated digital video services between the United States and those points listed in Comsat's tariff for the space segment component of IBS and associated digital video services.

3. IT IS FURTHER ORDERED that our authorization of PGE to provide private lines is limited to the provision of such private lines only between the United States and the Philippines -- that is, private lines which originate in the United States and terminate in the Phillipines or which originate in the Philippines and terminate in the United States. In addition, PGE may not -- and PGE's tariff must state that PGE's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Philippine end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the Philippines affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

4. IT IS FURTHER ORDERED that neither PGE nor any persons or companies controlling or controlled by PGE, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which PGE or any persons or companies controlling or controlled by PGE are parties.

5. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between PGE and its correspondent in the Philippines, and PGE shall file copies of the agreement with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. § 43.51(a)(3)).

6. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b), for INTELSAT satellite circuits.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] In its application PGE requests authority to acquire and operate facilities for the provision of common carrier sevices between the United States and the Philippines and points beyond. We note that should PGE obtain any interest in facilities beyond the Phillipines for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for PGE to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] PGE withdrew a request to lease capacity in the TPC-3/HAW-4 cable system. *See* Letter, dated June 18, 1992, from Gail E. Granton, Vice President and Counsel, Pacific Gateway Exchange, Inc.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UPS TELECOMMUNICATIONS, INC. File No. ITC-92-044

Application for authority to acquire and operate capacity in the TAT-8 cable system for the provision of common carrier services between the United States, the United Kingdom and France

UPS TELECOMMUNICATIONS, INC. File No. ITC-92-045

Application for authority to acquire and operate capacity in the NPC Cable System for the provision of common carrier services between the United States and Japan

UPS TELECOMMUNICATIONS, INC. File No. ITC-92-046

Application for authority to acquire and operate capacity in the TAT-9 cable system for the provision of common carrier service between the United States, Canada, the United Kingdom, France and Spain

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: June 23, 1992; Released: July 1, 1992

By the Chief, International Facilities Division:

1. The above-captioned applications, filed pursuant to Section 214 of the Communications Act of 1934, as amended, request authority to acquire and operate capacity in the following submarine cables, for the provision of International Digital Service: TAT-8, between the United States, United Kingdom and France, and beyond; TAT-9, between the United States, Canada, United Kingdom, France and Spain, and beyond; NPC, between the United States and Japan, and beyond.[1] The applications were placed on public notice on December 4, 1991. No comments were received.

2. UPS Telecommunications, Inc. (UPS), a wholly-owned subsidiary of United Parcel Service of America, Inc., is a non-dominant international carrier presently authorized to provide International Business Service (IBS) via Comsat[2] and International Digital Service via the PTAT-1 cable system, between the United States and various international points.[3] It now proposes to acquire and operate a one-half interest in one E-1 (2.048 Mbps) circuit in the TAT-8, TAT-9 and NPC cable systems, between the United States and each cable terminal point.[4]

3. With respect to UPS' proposed use of the NPC cable system, the Commission stated in its *Tel-Optik* decision that it would require common carriers wishing to acquire capacity in non-common-carrier cable systems to file applications pursuant to Section 214 of the Communications Act.[5] In this context, we find that UPS' application for authority to acquire and operate capacity in the NPC cable contains all of the information necessary under Section 63.01 of the Commission's Rules.[6]

4. No one has opposed UPS' request to use circuits in the NPC for the provision of common carrier services or argued that such use would cause an adverse economic impact on existing or planned common carrier facilities.[7] Moreover, we note that the Commission has found previously that use of the NPC cable for the provision of common carrier services can benefit the public by providing additional facilities on a particular route and, thus, facilitating the entry of additional service providers on such routes.[8] Finally, there is no evidence in the record to suggest that there will be a significant diversion of UPS' or other carriers' traffic from existing common carrier facilities.

5. Upon consideration of the instant applications, IT IS HEREBY CERTIFIED that the public convenience and necessity will be served by UPS' acquisition and operation of capacity for the provision of International Digital Service via the TAT-8 cable between the United States, United Kingdom and France, via the NPC cable between the United States and Japan, and via the TAT-9 cable between the United States, United Kingdom, France and Spain.[9]

6. Accordingly, IT IS ORDERED that application File No. ITC-92-044 IS GRANTED, and UPS is authorized to:

a. acquire, on an Indefeasible Right of User (IRU) basis, a one-half interest in and operate one E-1 circuit in the TAT-8 cable system between the cable station at Tuckerton, New Jersey and each of the TAT-8 cable stations in Widemouth, U.K. and Penmarch, France, for the provision of International Digital Service between the United States, on the one hand, and the United Kingdom and France, on the other hand; and

b. lease and operate circuits in any necessary domestic facilities between the Tuckerton, New Jersey TAT-8 cable station and UPS' Mahwah, New Jersey office.

7. IT IS FURTHER ORDERED that application File No. ITC-92-045 IS GRANTED, and UPS is authorized to:

a. acquire, on an IRU basis, a one-half interest in and operate one E-1 circuit in the NPC cable system between the cable station at Pacific City, Oregon and the NPC cable station in Miura, Japan, for the provision of International Digital Service between the United States and Japan; and

b. lease and operate circuits in any necessary domestic facilities between the Pacific City, Oregon NPC cable station and UPS' Mahwah, New Jersey office.

8. IT IS FURTHER ORDERED that application File No. ITC-92-046 IS GRANTED, and UPS is authorized to:

a. acquire, on an IRU basis, a one-half interest in and operate one E-1 circuit in the TAT-9 cable system between the cable station at Manahawkin, New Jersey and each of the TAT-9 cable stations in Goonhilly, U.K., St. Hilaire, France and Conil, Spain, for the provision of International Digital Service between the United States, on the one hand, and United Kingdom, France and Spain, on the other hand; and

b. lease and operate circuits in any necessary domestic facilities between the Manahawkin, New Jersey TAT-9 cable station and UPS' Mahwah, New Jersey office.

9. IT IS FURTHER ORDERED that UPS' application for authority to acquire capacity in TAT-9 for the provision of International Digital Service between the United States and Canada IS DENIED.

10. IT IS FURTHER ORDERED that our authorization of UPS to provide private lines is limited to the provision of such private lines which originate in the United States and terminate in the respective cable landing country, or which originate in the respective cable landing country and terminate in the United States. In addition, UPS may not -- and UPS' tariff must state that UPS' customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that the foreign country affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

11. IT IS FURTHER ORDERED that neither UPS nor any persons or companies controlling or controlled by UPS, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which UPS or any persons or companies controlling or controlled by UPS are parties.

12. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between UPS and its correspondents, and UPS shall file copies of the agreements with the Commission within 30 days of their execution. In addition, UPS (and its affiliates) shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. § 43.51, and in *Regulation of International Accounting Rates*, Phase II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. § 43.51(a)(3)).

13. IT IS FURTHER ORDERED that UPS shall file copies of any contracts entered into by UPS for the acquisition of interests in the NPC system within 30 days of their execution.

14. IT IS FURTHER ORDERED that UPS shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

15. IT IS FURTHER ORDERED that UPS shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

16. IT IS FURTHER ORDERED that UPS shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. § 63.10(b).

17. IT IS FURTHER ORDERED that the applicant shall file an appropriate Section 214 application requesting authority to acquire any additional circuits in the NPC system it may wish to acquire.

18. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] UPS initially requested authority to acquire and operate capacity in the three cables for the provision of International Digital Service between the U.S. and numerous international points. UPS subsequently clarified its application to propose only service to the points reached by the respective cables, and beyond. We note that should UPS obtain any interest in facilities beyond the respective cable landing countries for the purpose of providing common carrier services, including private line service, between the U.S. and other foreign points, such action would constitute an extension of line under Section 214 of the Act. Therefore, under the provisions of the Commission's International Competitive Carrier decision, *International Competitive Carrier Policies*, 102 FCC 2d 812 (1985), *recon. denied* 60 R.R. 2d 1435 (1986), it would be necessary for UPS to file additional applications for a certificate of public convenience and necessity under Section 214 to begin service to each additional country and for authority to acquire any facilities needed to provide service to such additional points.

[2] UPS Telecommunications Inc., 5 FCC Rcd 6681 (1990).

[3] UPS Telecommunications, Inc., 6 FCC Rcd 4774 (1991). International Digital Service appears to be a private line service. As described in UPS' tariff, International Digital Service is "furnished for point-to-point and point-to-multipoint use by the customer in the transmission of voice, data, facsimile, video teleconferencing, high speed data transfer and such other services as can be accommodated via International Digital Service facilities."

[4] UPS also states that its customers will be responsible for negotiation of operating or transiting agreements with foreign correspondents.

[5] Tel-Optik Limited, 100 FCC2d 1033, 1048 (1985) (*Tel - Optik*).

[6] The Commission places no special burdens on any carrier making an application for non-common-carrier cable capacity. It requires carriers to provide the information required by the Commission's Rules to be contained in a Section 214 application. *See* Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, 4 FCC Rcd 4454 (1989) (*Clarification Order*).

[7] The Commission has stated that it has authority under its Section 214 public interest mandate to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. The Commission has said, however, that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Further, "[e]ven if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the presence of these factors would not be conclusive evidence of economic harm. The resolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Clarification Order*, 4 FCC Rcd at 4456.

[8] *See, e.g.*, CICI, Inc., 6 FCC Rcd 4984 (Int'l Fac. Div. 1991); American Telephone and Telegraph Company, 6 FCC Rcd 2870 (Com. Car. Bur. 1991).

[9] As TAT-9 provides no direct circuits between the United States and Canada, we will deny UPS' request to acquire capacity on TAT-9 for the provision of International Digital Service between the United States and Canada.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re the Application of

WISCONSIN BELL, INC. W-P-D-347
authorization to discontinue service
on its broadband channel distribution
system in Brookfield, Wisconsin.

MEMORANDUM OPINION AND ORDER

Adopted: June 15, 1992; Released: July 1, 1992

By the Commission:

1. Paragon Cable Television, Inc. (Paragon), operator of a cable television system in portions of Brookfield, Wisconsin, has filed an Application for Review of the *Order and Authorization* (*Authorization*),[1] issued by the Chief, Common Carrier Bureau (Bureau), granting Wisconsin Bell, Inc. (Wisconsin Bell) authority to discontinue service, as described below. A consortium of other parties who did not participate earlier seek partial reconsideration of the Bureau's *Authorization*.[2] The Application for Review is opposed by Wisconsin Bell.[3] For the reasons stated below, we affirm the grant of discontinuance authority to Wisconsin Bell.[4]

I. INTRODUCTION

2. The *Authorization* granted Wisconsin Bell authority pursuant to Section 214 of the Communications Act of 1934, as amended, 47 U.S.C. §214, to discontinue service on its broadband distribution system in Brookfield, Wisconsin. Wisconsin Bell sought to sell its broadband assets, formerly leased by Telenational Communications, Inc. (Telenational), to a new cable television franchisee, Warner Cable Communications of Milwaukee, Inc. (Warner). Paragon opposed the sale on the basis that it was interested in leasing the broadband service to provide cable television service, and/or a type of pay television service which would not rely on over-the-air transmission service and, according to Paragon, would not be subject to regulation under the Cable Communications Policy Act of 1984, 47 U.S.C. §521 *et seq.*

3. The Bureau granted the Section 214 discontinuance application finding that discontinuance of broadband service by Wisconsin Bell would not adversely affect the present or future public convenience and necessity. Additionally, the Bureau found that grant of discontinuance authority would, in fact, further the public interest because it would permit the residents of Brookfield to continue to receive cable television service from a newly franchised provider. Paragon's franchise to provide cable service in Brookfield has been revoked by the city.[5] The Bureau noted that the Cable Act states that a cable operator generally may not provide cable service without a valid franchise. 47 U.S.C. §541(b)(1). It also noted that Wisconsin Bell's channel service tariff requires a lessee to have all necessary authority to provide the proposed service, which Paragon apparently did not have. The Bureau found that, absent a contrary decision by the federal district court, the city's revocation of the franchise is entitled to a presumption of validity.[6] Regarding use of the system in a manner which would not require a franchise, the Bureau found that Paragon failed to define its proposed use of the channel distribution system and had not distinguished its proposal from activity identified as needing a franchise in the Cable Act, 47 U.S.C. §§541(b)(1), 522(5). *Authorization*, 4 FCC Rcd at 2240, para. 18. It added that Paragon had not in fact made use of the system in any manner and could cite no attempt to provide such service. Based on these findings, the Bureau authorized Wisconsin Bell to discontinue its above-mentioned service.

II. APPLICATION FOR REVIEW

4. Paragon argues that the Bureau's decision should be reversed because it sets damaging precedent "in finding that a local cable franchise is a prerequisite to offering a pay service over a channel leased from the owner of the cable plant."[7] Paragon states that the Bureau has declared that the lease of a channel from Wisconsin Bell for a pay service requires a cable franchise from the franchising authority.[8] Paragon argues that it should not be penalized for not "distinguish[ing] its plans from the applicability of the Cable Act."[9]

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[1] 4 FCC Rcd 2238 (Com. Car. Bur. 1989)

[2] On April 10, 1989 the National Satellite Programming Network, MaxTel Limited Partnership, Mid-Atlantic Communications, Inc., Telesat Cablevision, Inc., Telecom Satellite Systems Corp., and 21st Century Technology Group, Inc., collectively filed for reconsideration of that part of the *Authorization* which, they state, "holds, apparently without exception, that Section 541(b)(1) of the Cable Act requires a franchise for the provision of cable service and that only an entity with a valid franchise is a legally viable customer for common carrier broadband services," *citing Authorization* at paras. 18-19.

[3] On March 31, 1989, Paragon filed a Motion to Stay the *Authorization* pending review. The Bureau denied the Motion to Stay. *See* 4 FCC Rcd 7534 (1989). Wisconsin Bell states that it will not file a separate brief in response to the Application for Review but that it incorporates by reference its Response to Paragon's Motion to Stay.

[4] Because we affirm the grant of Wisconsin Bell's application, Paragon's request that the Commission stay the Bureau's decision pending review is moot and is hereby dismissed.

[5] Paragon states that it was in the process of constructing a cable television system in Brookfield when the city revoked its franchise and authorized Telenational to construct in Brookfield. Paragon is contesting the legality of that revocation in a pending federal court action against the City of Brookfield. *See Paragon Cable Television, Inc. v. City of Brookfield*, Case No. 83-C-1686 (E. D. Wisc.). Wisconsin Bell states that Paragon owns its own cable and electronics within that portion of Brookfield where it operates a cable television system.

[6] In a prior case where Paragon alleged it had been improperly denied pole attachment rights, the court held that it is appropriate for the Commission to employ a presumption of validity of the city's franchise revocation while that issue is pending in federal court in Wisconsin. *See Paragon Cable Television, Inc v. F.C.C.* , 822 F.2d 152 (D.C. Cir. 1987).

[7] Application for Review at 3.

[8] *Id.* at 3-4.

[9] *Id.* at 8.

5. Wisconsin Bell argues that Paragon bases its appeal primarily upon a claimed right under 47 U.S.C. §532 to "leased access channels for commercial use."[10] Wisconsin Bell asserts that assuming, *arguendo*, that this statutory provision does create rights for a nonfranchised cable television operator, those rights would clearly survive Wisconsin Bell's abandonment of service and transfer of assets to Warner Cable because Paragon can obtain service from Warner Cable, the new franchised cable television operator in Brookfield.[11] Wisconsin Bell adds that since Paragon never argued that 47 U.S.C. §532 requires that cable operators make leased channel space available even to nonfranchised operators -- and the Bureau never discusses that section -- the order cannot be precedential on this point.[12] Even if the Commission were to address Paragon's new claim, Wisconsin Bell insists that Paragon has no right to use access channels for pay television purposes absent a franchise.[13] Wisconsin Bell states Paragon has only indicated a desire to use access services for an undefined "pay TV" purpose. Wisconsin Bell states because it is no longer in a position to offer these access services, there is no necessity for this Commission to reach the question of how the §532 Leased Access Channel provisions relate to telephone companies.[14]

6. Paragon counters that:

> Wisconsin Bell must be held to know that for cable people like Paragon to try to lease channel capacity from a competitor like Warner Cable is a far-different matter than leasing from a common carrier like Wisconsin Bell.... [A] cable operator like Warner is permitted by 47 U.S.C. § 532(c)(1) to impose restrictions on a lessee to assure that the leased channel use will not adversely affect the cable system. But, when the facilities are owned by the telephone company, channel leasing may be expected to be a true common carrier offering -- the telephone company's principal interest should be in leasing space because, unlike Warner Cable, it can afford the luxury of being completely blind to the content of the program service.[15]

7. Wisconsin Bell argues that the obligation to provide access channels under § 532 implicates only "cable operators," and not common carriers.[16] Wisconsin Bell states that it provided only common carrier services to the franchised cable operator, Telenational, and nothing in the record suggests that Paragon ever requested any access service from Telenational.

III. DISCUSSION

8. In considering a carrier's request to authorize discontinuance of service pursuant to Section 214(a) of the Act, the Commission must determine whether the proposed action will adversely affect the present or future public convenience and necessity. Application of this standard generally involves balancing the burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[17] This balancing process under Section 214(a) is directed at preventing a loss or worsening of a service offering to a community or part of a community unless the Commission determines it is in the public interest.[18]

9. Applying these standards to this case, we agree that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of Wisconsin Bell's channel service offering. The record demonstrates that no entity other than Paragon had expressed any interest in a channel service offering. We also agree that Paragon's late and vague expression of interest in leasing some capacity is an inadequate reason to deny the application. The record demonstrates that Paragon did not request use of the channel distribution system until after Wisconsin Bell had filed its application to sell the facilities to Telenational. During the pendency of the Section 214 application Paragon argued that the service should not be discontinued because it was interested in utilizing the service and the issue of the revocation of its franchise is the subject of ongoing litigation. It is only in a footnote to its last pleading that Paragon adds that it, "has in mind a pay TV service which would not rely on over-the-air service; would therefore not be defined as 'cable television'; and would be entitled to full First Amendment protection."[19] Paragon furnishes no further explanation for this alternative use of the system. Nothing in the record suggests that the residents of Brookfield will use Paragon's ill-defined proposed service. Under these circumstances, requiring Wisconsin Bell to continue to provide broadband services based solely on Paragon's vague and speculative proposal would serve no public interest purpose but rather would impose an unwarranted burden on the carrier.

10. The needs and interests of the user community (*i.e.*, subscribers of cable television service) center on the continuation of cable television service in Brookfield. In this regard, the record indicates that the city of Brookfield approved the franchise transfer from Telenational to Warner and that discontinuance of channel service by Wisconsin Bell would be simultaneous to the transfer of assets to Warner. Granting Wisconsin Bell Section 214(a) discontinuance authority will facilitate the transfer of broadband facilities to Warner, the franchised cable operator, thus ensuring that subscribers continue to receive cable television service without interruption. For these reasons, we conclude that the Bureau correctly authorized Wisconsin Bell to discontinue its broadband service pursuant to Section 214(a).[20]

11. Paragon also argues that the decision should be reversed because, "the process employed by the Bureau in

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[10] Wisconsin Bell's Response to Paragon's Motion to Stay at 1.
[11] *Id.* at 2.
[12] *Id.*
[13] *Id.*
[14] *Id.* at 3.
[15] Paragon Reply to Wisconsin Bell Opposition at 6.
[16] Wisconsin Bell Response to Paragon Motion to Stay at 3.
[17] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 790,795-96 (1978).
[18] *Lincoln County Telephone System, Inc. v. Mountain States Telephone and Telegraph Co.*, 81 FCC 2d 328, 331-32 (1980); *Western Union Telegraph Co.*, 74 FCC 2d 293, 295 (1979).
[19] Paragon Reply at 5.
[20] Given the ill-defined nature of Paragon's proposed service, and the lack of any evidence of consumer demand for it, whether or not Paragon would be entitled to leased access under

arriving at its decision is of dubious legality."[21] To support this argument Paragon cites the Bureau's request that Wisconsin Bell furnish additional information regarding the participation of American Cablevision, Inc. in the transaction, and the sale price and net book value of the facilities. Contrary to Paragon's suggestion, however, the Bureau's procedure was consistent with our rules and otherwise appropriate. Requests for additional information relating to applications under Section 214 of the Act are expressly contemplated by Section 63.51 of the Commission's rules. The Bureau's request served to establish a more complete record upon which to base a decision. Paragon was informed of the request, it was served with a copy of the additional information, and it filed its own comments and views regarding the additional facts. We thus reject Paragon's challenge to the Bureau's procedure.

12. Finally, Paragon raises other objections to the *Authorization* in the nature of questions which it claims remain unanswered.[22] The thrust of Paragon's objections seems to be that if the facilities had been more openly offered it "might have made a bid to acquire them in order, itself, to lease them back to a qualified franchisee." Paragon fails to support its statement with any evidence of prior interest in acquiring the system, and, in any event, Wisconsin Bell is not under an affirmative legal obligation to have offered it for sale to Paragon. Paragon's speculative comment that it might have made a bid certainly cannot constitute grounds that grant of the discontinuance application would not serve the public convenience and necessity.

IV. CONCLUSION

13. We have reviewed the record in this proceeding and for the reasons set forth herein, we affirm the authorization to Wisconsin Bell to discontinue channel distribution thus enabling the transfer of these facilities to Warner, the franchisee in Brookfield. This action is consistent with Section 214(a) and serves the public interest because it permits the residents of Brookfield to continue to receive cable television service without disruption.[23]

V. ORDERING CLAUSES

14. Accordingly, IT IS ORDERED, that the grant of Wisconsin Bell, Inc.'s application for authorization to discontinue service offered over its broadband channel distribution system in Brookfield, Wisconsin IS AFFIRMED.

15. IT IS FURTHER ORDERED, that the *Order and Authorization* issued by the Chief, Common Carrier Bureau, 4 FCC Rcd 2238 (1989), IS VACATED.

16. IT IS FURTHER ORDERED, that the Application for Review filed by Paragon Cable Television, Inc. IS DENIED to the extent set forth herein and IS GRANTED to the extent set forth herein.

17. IT IS FURTHER ORDERED, that Paragon's concurrent Motion to Stay pending resolution of the Application for Review IS DISMISSED AS MOOT.

18. IT IS FURTHER ORDERED, that the Petition for Reconsideration jointly filed by National Satellite Programming Network, MaxTel Limited Partnership, Mid-Atlantic Communications, Inc., Telesat Cablevision, Inc., Telecom Satellite Systems Corp., and 21st Century Technology Group, Inc. IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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47 U.S.C. § 532 is not germane to our decision. For this reason, questions regarding whether Paragon would need a franchise for leased access or some other purpose also are not germane to our decision. Accordingly, we vacate the Bureau's decision, which addressed these matters. As a result, many of the specific arguments raised by Paragon, and the Petition for Reconsideration in its entirety, need not be addressed.

[21] Application for Review at 9.

[22] *Id.* at 10.

[23] We affirm the grant of discontinuance authority to Wisconsin Bell based on our discussion set forth herein. Because we do not pass on various other matters raised by the Bureau, *see, e.g.*, note 20, *supra*, we vacate the Bureau's decision. As a result, we dismiss the Petition for Reconsideration as moot.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALLNET
COMMUNICATION
SERVICES, INC.,
Complainant,

v. File No. E-91-65

SOUTH CENTRAL
BELL TELEPHONE COMPANY,
Defendant.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 18, 1992; Released: July 1, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On March 13, 1991, Allnet Communication Services, Inc., ("Allnet") filed with the Commission the above-captioned formal complaint against South Central Bell Telephone Company ("South Central Bell" or the "Defendant"). The complaint challenged the lawfulness of Defendant's assessment of certain charges for Allnet's underutilization of facilities specifically constructed for Allnet by Defendant as part of interstate switched and special access service offerings.[1] South Central Bell filed an answer denying the allegations and also moved to dismiss the complaint.

2. The parties have conducted discussions aimed at settling the complaint. As a result of these negotiations, a mutually agreeable settlement of all pending controversies was reached. On June 9, 1992, the parties filed a joint motion requesting dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the parties' joint motion to dismiss with prejudice IS GRANTED and the proceeding IS TERMINATED.

[1] Since the filing of the Complaint and Answer, South Central Bell has merged into a single corporate entity with Southern Bell Telephone and Telegraph under the new corporate name of BellSouth Telecommunications, Inc. effective January 1, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

CONTEL OF ARKANSAS, INC.,	File No. E-90-236
CONTEL OF CALIFORNIA, INC.,	File No. E-90-237
CONTEL OF IOWA, INC.,	File No. E-90-239
CONTEL OF KANSAS, INC.,	File No. E-90-240
CONTEL OF KENTUCKY, INC.,	File No. E-90-241
CONTEL OF MISSOURI, INC.,	File No. E-90-242
CONTEL OF NORTH CAROLINA, INC., and	File No. E-90-243
CONTEL OF SOUTH ALABAMA, INC.,	File No. E-90-244

Defendants.

ORDER

Adopted: June 23, 1992; Released: July 1, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. LDDS Communications, Inc. (LDDS) filed the above-captioned complaints seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 to December 31, 1988. The defendants have requested that the complaints be dismissed on the grounds that the complainant had not purchased interstate access services from them during the relevant period. The complainant subsequently reviewed its files and determined that, in fact, it had not purchased services from the defendants during the relevant period as alleged in its complaints and states that it does not oppose dismissal of the complaints with prejudice.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the defendants' requests for dismissal ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 86-10

PUBLIC NOTICE

Released: June 26, 1992

PLEADING CYCLE ESTABLISHED FOR COMPETITIVE TELECOMMUNICATIONS ASSOCIATION'S PETITION FOR EXPEDITED DECLARATORY RULING REGARDING ISSUES ASSOCIATED WITH IMPLEMENTATION OF 800 DATA BASE SYSTEM

On June 19, 1992, Competitive Telecommunications Association (Comptel), filed a petition for expedited declaratory ruling on three issues associated with the implementation of 800 data base service. Specifically, Comptel asks the Commission to rule that: (1) "area-of-service-routing" (*i.e.*, directing the routing of calls to different interexchange carriers (IXCs) based on place of origination of the call) is a functionality of basic 800 service access; (2) any entity may act as a "Responsible Organization" (RESPORG) on behalf of a provider of interstate 800 services, whether or not that entity or the service provider is a purchaser of 800 access; and, (3) 800 Service Management System (SMS) access must be tariffed by Bellcore.

Comptel asserts that because smaller IXCs do not have a presence in every local access and transport area (LATA) and therefore must use transport facilities provided by other carriers in order to offer nationwide 800 service, treating areaof-service routing as a non-chargeable element of basic 800 access is necessary to enable these IXCs to compete in the nationwide marketplace. In addition, Comptel states that since only a RESPORG may access customer records and input service orders, allowing any entity to act as a RESPORG, regardless of whether that entity purchases interstate 800 access, is necessary to ensure that smaller IXCs are not forced to rely on their major competitors to handle their customer records and service orders.

Finally, Comptel contends that SMS access must be tariffed to ensure that the rates, terms, and conditions for this monopoly service are reasonable and nondiscriminatory. Otherwise, it states, the BOCs could provide SMS access pursuant to a "contract of adhesion" that might preclude participation by many smaller IXCs. Comptel states that by granting its petition in an expedited manner, the Commission will ensure that smaller IXCs have a fair opportunity to compete in the 800 marketplace and that the Commission's goals in this proceeding will be realized.

Interested parties should file comments on the petition by July 10, 1992, and reply comments by July 17, 1992, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Marian R. Gordon, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petition can be obtained from Downtown Copy Center at (202) 452-1422.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally* 47 C.F.R. Sections 1.1200-1.1216. For further information, contact Gary Phillips or Marian Gordon, Policy and Program Planning Division, Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re:

DESERT EMPIRE TELEVISION CORPORATION AND GULF-CALIFORNIA BROADCAST COMPANY — CSR-3571

Petition for Special Relief

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1992; Released: July 1, 1992

By the Chief, Mass Media Bureau:

INTRODUCTION

1. On June 11, 1991, Desert Empire Television Corporation [KMIR-TV] and Gulf-California Broadcast Company [KESQ-TV], licensees, respectively, of Stations KMIR-TV (NBC, Channel 36) and KESQ-TV (ABC, Channel 42), both Palm Springs, California, filed the captioned petition for special relief. By this petition, KMIR-TV and KESQ-TV seek to be able to enforce network program nonduplication protection and syndicated program exclusivity against the seven VHF stations licensed to Los Angeles, California.[1] To do this, petitioners seek to delete the Los Angeles stations from the Commission's original list of significantly viewed signals with respect to Riverside County Central, California.[2] In the alternative, petitioners seek waivers of §§ 76.92(f) and 76.156(a) of the Commission's program exclusivity rules, which exempt significantly viewed signals from program deletions pursuant to the network program nonduplication and syndicated program exclusivity rules. KMIR-TV's and KESQ-TV's petition is opposed by KTLA Inc., licensee of Television Broadcast Station KTLA (Ind., Channel 5), Los Angeles, California; KCOP Television, Inc., licensee of Television Broadcast Station KCOP (Ind., Channel 13), Los Angeles, California; Warner Cable Communications, Inc. [Warner], operator of a cable television system serving Palm Springs, California; Desert Hot Springs Cablevision, Inc. [Cablevision], operator of a cable television system serving Desert Hot Springs, California, and neighboring portions of Riverside County; and by Palmer Communications, Inc. d/b/a Palmer CableVision [Palmer], operator of a cable television system serving Palm Desert, California and neighboring communities. KMIR-TV and KESQ-TV have filed a consolidated reply to opponents.

2. Since 1965, the Commission has, to varying degrees, applied program exclusivity rules to cable systems. The current rules, which became effective January 1, 1990, allow television broadcast station licensees to exercise both network program nonduplication and syndicated exclusivity rights, in accordance with the relevant network affiliate agreements and syndicated program license agreements. 47 C.F.R. §§ 76.93, 76.153(a). These rights may, on proper notification, be asserted through the licensee's market against out-of-market stations. 47 C.F.R. §§ 76.92, 76.151. Stations that are significantly viewed, however, are exempt from being deleted under the program exclusivity rules. 47 C.F.R. §§ 76.92(f), 76.156(a).

3. KMIR-TV and KESQ-TV are both licensed to Palm Springs, California, the 35-mile market zone of which encompasses Desert Hot Springs, Palm Desert, and Palm Springs, California, and neighboring communities in Riverside County Central.[3] Stations KCBS-TV, KNBC-TV, KTLA, KABC-TV, KHJ-TV, KTTV and KCOP are all licensed to Los Angeles, California, which designated market zone does not at all overlap Riverside County Central.[4] Consequently, KMIR-TV and KESQ-TV would be able to assert program exclusivity rights against the Los Angeles licensees on Warner's, Cablevision's, and Palmer's cable systems. However, because the Los Angeles licensees are listed as significantly viewed in Riverside County Central, they are exempt from being deleted from the cable systems in question. Nevertheless, KMIR-TV has received essentially continuous network program nonduplication protection since the station's sign-on in 1968.[5] From 1968 until 1980, there was no significantly viewed exception to the network program nonduplication rules, and KMIR-TV enjoyed protection by the terms of the rule itself. After the exception was introduced, the station obtained continued protection from the two largest local cable systems on a voluntary basis until June 1, 1982.[6] Five months later, based upon data tending to show a correlation between loss of protection and loss of audience and, by implication, the station's ability to serve the public interest, the Commission granted KMIR-TV a temporary 18-month waiver of the significantly viewed exception to § 76.92 of the Commission's Rules. *Desert Empire Television Corporation*, 91 FCC 2d 1178 (1982), *granting recon. in part of* 86 FCC

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[1] These are Stations KCBS-TV (CBS, Channel 2), KNBC-TV (NBC, Channel 4), KTLA (Ind., Channel 5), KABC-TV (ABC, Channel 7), KKJ-TV (Ind., Channel 9), KTTV (Ind., Channel 11), and KCOP (Ind., Channel 13), all Los Angeles, California.

[2] *Reconsideration of the Cable Television Report and Order*, 36 FCC 2d 326, 383-384 app. B (1972). These are the only signals listed as significantly viewed in Riverside County Central (Riverside County is divided into thirds on the Commission's list of significantly viewed signals). For a network station to be significantly viewed, it must achieve off-air a share of viewing hours of at least 3 percent (total week hours) and a net weekly circulation of at least 25 percent. The minimum figures for an independent station are 2 percent and 5 percent, respectively.

[3] All television broadcast stations are entitled to assert program exclusivity rights within a 35-mile zone surrounding a station's community of license.

[4] Los Angeles is part of the Los Angeles-San Bernardino-Corona-Fontana major television market (#2). 47 C.F.R. § 76.51(a). None of the other designated community 35-mile zones encompass the communities in question in this proceeding.

[5] The original syndicated exclusivity rules, in force from 1965 to 1980, contained no significantly viewed exception. This exception to the syndicated exclusivity rules was introduced when the rules were reinstated in 1990.

[6] KESQ-TV states that its history of protection "has followed roughly the same course."

2d 644 (1981). Any extension of the waiver would have had to have been justified by significant audience diversion and financial data. *Id.* at 1189.

4. Rather than seek an extension of its waiver, KMIR-TV, joined by KESQ-TV, negotiated an accord with Warner, Cablevision, and Palmer (with the consent of KNBC-TV and KABC-TV[7]) whereby the cable systems afford simultaneous network program nonduplication protection to KMIR-TV and KESQ-TV in exchange for promotion of the cable systems on the two stations. This agreement, submitted to the Commission on May 16, 1984, has twice been renewed and does not expire until April 5, 1993. However, stating that they "need the certainty and security that would accrue from relief mandated by the Federal Communications Commission," KMIR-TV and KSEQ-TV have filed the present petition.

SUMMARY OF PLEADINGS

5. In support of their petition, KMIR-TV and KESQ-TV argue that the seven Los Angeles VHF stations are in fact *not* significantly viewed in Riverside County Central. Petitioners state that the stations' transmitter sites atop Mt. Wilson are 80 miles or more distant from the cable communities in question, across "high intervening mountains... which make satisfactory reception of Los Angeles signals off-the-air virtually impossible." Petitioners attribute the high cable penetration in the Palm Springs ADI (Arbitron Area of Dominant Influence), measured at 90 percent in February 1991, to the foregoing distance and terrain factors, given the need for access to the Los Angeles stations in view of the limited number of local television licensees in Riverside County Central. Petitioners continue to maintain, as they have maintained previously, albeit unsuccessfully, *see Desert Empire Television Corporation, supra,* that the Los Angeles stations listed as significantly viewed, in fact, are not significantly viewed. This is, petitioners aver, now confirmed by Arbitron. Petitioners submit letters from Arbitron which state that all diary keepers in the Palm Springs ADI recording viewing of Los Angeles stations and listed as off-air households in the November 1989 survey were, in fact, cable households (or satellite, MDS, MATV, or SMATV households). Petitioners also submit a statement from Norman Hecht, president of Norman Hecht Research, Inc., in which Mr. Hecht states that examination of Arbitron diaries from Riverside County Central from February 1990 through February 1991, shows no viewing offair of the Los Angeles VHF signals. This is bolstered petitioners argue, by computer-generated data concerning predicted station contour coverage which predict that, in the Palm Springs ADI, only "virtually uninhabited" portions of Palm Springs and Idyllwild-Pine Cove should receive a Grade B signal from any of the Los Angeles VHF stations.

6. KMIR-TV and KESQ-TV argue that the foregoing information is sufficient to warrant a grant of their petition, and that community-specific viewing surveys should not be required. The area in question, Riverside County Central, is small, and, within the ADI, six consecutive county-wide surveys spanning two years have shown no off-air viewing of the Los Angeles VHF stations. The high cable penetration in the region would make it very difficult to obtain a statistically valid sample of noncable homes for community-specific surveys, petitioners assert. The total cost of the surveys, according to Mr. Hecht (based on a letter from VideoProbeIndex, Inc.), would be $78,000 to $85,000, which petitioners maintain would be unreasonably burdensome. KMIR-TV and KESQ-TV argue that grant of their petition would recognize the reality of the lack of availability of the Los Angeles signals in the communities in question, and would eradicate an unfair distortion of the marketplace from the rules' significantly viewed signal exception, citing *KKTV, Inc.*, 6 FCC Rcd 3621 (1991); *Report and Order in Gen. Docket No. 87-24*, 3 FCC Rcd 5299, 5315 (1988), *recon. denied in pertinent part*, 4 FCC Rcd 2711 (1989); and *KDUB-TV Inc.*, 83 FCC 2d 153, 157 (1980), *recon. denied*, 85 FCC 2d 572 (1981). Petitioners note that grant of the requested waiver will enable them to abrogate their agreement with Warner, Cablevision, and Palmer, freeing up the advertising time committed to those cable systems and channelling the income realized thereby into other programming. In addition, petitioners will be able to receive full program exclusivity protection on the systems.

7. In opposition to KMIR-TV and KESQ-TV, all opponents note the Commission's settled policy of not deleting signals from the 1972 list of significantly viewed signals, citing *KCST-TV, Inc.*, 103 FCC 2d 407 (1986), and the *Cable Television Report and Order*, 36 FCC 2d 143, 175 n.45 (1972). In addition, all opponents characterize petitioners' data as insufficiently probative, and contend that grant of petitioners' request would cause disruption to the marketplace.

8. KTLA and KCOP argue, too, that each is, in fact, a local station to the Palm Springs area, and that they are carried on area cable systems. KTLA states that since 1985, it has had an average sign-on to sign-off rating of 2 in the Nielsen Palm Springs DMA (Designated Market Area), and, since 1988, a share of between 5 and 7, often higher than KMIR-TV and KESQ-TV.[8] KCOP notes that the Palm Springs ADI "has always been heavily cabled," ranging from a penetration of 63 percent in November 1975 to a high of 99 percent in November 1979, and recently at 90 percent in February 1991. Petitioners were aware of these facts in entering the marketplace, claim KTLA and KCOP,[9] and bargained for their program exclusivity based on the existing marketplace conditions. Grant of KMIR-TV's and KESQ-TV's petition, contend KTLA and KCOP, would award the Palm Springs licensees an unwarranted windfall, particularly, argues KCOP, given that petitioners have no expectation of exclusivity against KCOP, citing *KKTV, Inc., supra.*

9. Opponents further contend that KMIR-TV's and KESQ-TV's petition is an attempt to reargue issues that were settled in *Desert Empire Television Corporation, supra,* which should not and need not be reheard, for reasons both of administrative finality, citing *Mayeske v. International Association of Fire Fighters*, 905 F.2d 1548, 1553

[7] At the time of the initial agreement, both KNBC-TV and KABC-TV, by virtue of their significantly viewed status, were entitled to mandatory carriage on the affected cable systems.

[8] These figures appear to reflect combined off-air and cable viewing.

[9] Both KMIR-TV and KESQ-TV began operation in October 1968. Warner began operations in 1956, Palmer in 1959, and Cablevision in 1967, all prior to KMIR-TV's and KESQ-TV's entry into the market.

(D.C. Cir.), *cert. denied*, 111 S. Ct. 347 (1990), and collateral estoppel, citing *Montgomery County Media Network Inc. d/b/a Imagists, et al.*, 4 FCC Rcd 2609 (1989), and *United Broadcasting Company, et al.*, 86 FCC 2d 452 (1981). Nor, contend opponents, have KMIR-TV or KESQ-TV demonstrated harm to themselves which would warrant relief. Indeed, notes Palmer, petitioners have submitted no financial data to justify relief, whereas both Palmer and Cablevision maintain that grant of the relief requested could cost the systems annually as much as $48,000 and over $30,000, respectively, in addition to $60,000 in equipment costs to Cablevision. In contrast, states Cablevision, KMIR-TV and KESQ-TV appear to be thriving, achieving sign-on to sign-off shares of 29 and 35, respectively, in the Palm Springs ADI in non-cable households in 1991, citing Arbitron survey data.

10. In addition, Warner, Cablevision, and Palmer note that the data petitioners submit does not conform with the guidelines of *KCST-TV, Inc., supra*. Rather than submit community-specific data, opponents note that KMIR-TV and KESQ-TV have submitted general Arbitron county-wide studies, which they argue is insufficient, particularly given that Arbitron data reveals that approximately one out of every ten Riverside County Central television households is a noncable home, and that cable penetration in Desert Hot Springs (Cablevision's franchise area) is only 67.5 percent, according to the 1991 edition of the *Television & Cable Factbook*. Warner also challenges petitioners' signal strength prediction submissions, noting that they do not constitute a study of actual signal strengths, and are irrelevant in any event, as many stations enjoy significant viewership beyond their Grade B contours. Finally, Warner and Cablevision decry petitioners' stated desire to abrogate the agreement negotiated and renewed among the parties. They contend that this is contrary to Commission policy supporting and encouraging negotiated program exclusivity agreements, citing *King Videocable Company*, 6 FCC Rcd 2218 (1991); *Gen. Docket No. 87-24, supra;* and *Second Report and Order in Docket No. 19995*, 54 FCC 2d 229 (1975). Cablevision notes that petitioners could be in breach of § 5 of the agreement, which sets forth a discussion and arbitration procedure for resolving differences, and Palmer states that petitioners have not even contacted Palmer to negotiate a solution.

11. In reply, KMIR-TV and KESQ-TV assert that six separate Arbitron surveys since 1989 in fact show no off-air viewing of the Los Angeles VHF stations in Riverside County Central, and that Riverside County Central data is statistically satisfactory to demonstrate lack of significantly viewed status for Commission purposes, citing an affidavit from Robert Schultz, president of VideoProbeIndex, Inc. Petitioners again note the high cable penetration rate in the Palm Springs ADI, and also note a large number of unlisted telephone numbers in the communities in question, and also a prevalence of vacation homes frequently unoccupied, all of which factors combine to make community-specific surveys difficult and unwarranted.[10] Petitioners, too, cite *KCST-TV, Inc., supra*, for the proposition that community-specific surveys are not mandatory, and contend that their evidence is stronger than that accepted in *KCST-TV, Inc., supra*. Petitioners' data, they argue, show a complete absence of off-air viewing of the stations in question, and cover an area less than half the size of petitioners' specified 35-mile market zone. This is buttressed, KMIR-TV and KESQ-TV claim, by their engineering calculations, which are significantly accurate as probative evidence, citing *KKTV, Inc., supra*. Petitioners deny that they will reap any windfall from grant of their petition, but that they will merely be able to enforce rights they have already obtained from their program suppliers. Any windfall, petitioners argue, currently accrues to opposing stations and cable systems, which enjoy the advantages of the stations' unwarranted significantly viewed status.

12. KMIR-TV and KESQ-TV also challenge opponents' claims of harmful impact, submitting a 1989 affidavit from a National Association of Broadcasters engineer (in a different proceeding), contending that necessary switching equipment should only cost $1000. Petitioners also note that Warner, Cablevision, and Palmer have already agreed to certain programming deletions for years, undercutting their claims of harmful disruption were petitioners' request to be granted. Petitioners further contend that the issues and circumstances present today -- particularly intervening policy changes and the current data supplied by petitioners -- are different from those at issue a decade ago in *Desert Empire Television Corporation, supra*, and thus collateral estoppel and issue preclusion are inapplicable in the present case. Nor, assert petitioners, is relief barred by the current agreement with the cable operators. Petitioners seek "a determination in the first instance that they are entitled to relief," after which all parties may negotiate a new agreement, should they agree to do so.

DISCUSSION

13. In 1972, in adopting comprehensive cable television rules, the Commission established a nationwide list of significantly viewed signals. *Cable Television Report and Order, supra*. While the list was based upon county-wide data, the Commission recognized the inherent inadequacies of such data, but determined that the need "to provide a base of signals" and for "cable to get moving" warranted the use of such data at that time. *Id.* at 175. The Commission added, however, that in the future community-specific data would be required to add a signal to the list. *Id.* at 175-176. At the same time, the Commission ruled that signals would not be removed from this list based upon future surveys. *Cable Television Report and Order*, 36 FCC 2d at 175 n.45. We found that this policy promotes stability and certainty for both broadcasters and cable operators in a number of regulatory areas, and is in the public interest. *See KCST-TV, Inc., supra; Cable Television Report and Order, supra*. Petitioners have presented no specific justification for departing from our settled policy of not deleting stations from our list of significantly viewed signals, and we decline to do so.

14. In 1986, in *KCST-TV, Inc., supra*, the Commission adopted a process whereby parties could seek waivers of certain cable television rules that establish rights based upon a station's status as significantly viewed. In initially addressing the question of waiving our program exclusivity rules based on challenges to stations' significantly viewed status, we stated:

[10] KMIR-TV and KESQ-TV also note, further questioning opponents' figures, that Cablevision claims 8312 subscribers in its franchise area, while its copyright forms claim only 6334 subscribers.

> Petitioners seeking a waiver of [§ 76.92] of the Rules based on an allegation that a particular station is no longer significantly viewed will be expected to make such a demonstration utilizing community- or system-specific data, to one standard error, and will be expected to show that the station in question has not met our standards for significant viewing for two consecutive years.

KCST-TV, Inc., 103 FCC 2d at 413. *See also Russell-Rowe Communications, Inc.*, 7 FCC Rcd 2525 (MMB 1992). Just as with its requirements for adding signals to the list, the Commission requires community- or system-specific data for waivers of rules which are based upon the list. The issue presented in this case is whether petitioners' showing meets the requirements set forth in *KCST-TV, Inc., supra.* We conclude that it does not. In the present case, petitioners have merely submitted general marketwide information, contending that community- or system-specific surveys would be nearly impossible to conduct, too burdensome an expense, and unnecessary given petitioners' submitted evidence. We disagree.[11]

15. Petitioners claim that county-wide data should be accepted as demonstrating that the Los Angeles stations are not significantly viewed, because market data which were not community-specific were accepted in *KCST-TV, Inc., supra.* In this respect, petitioners maintain that their data is more compelling than the data accepted in *KCST-TV, Inc., supra.* In *KCST-TV, Inc.*, however, we noted that the data submitted "amount[ed] to the system-specific or community-specific showing we would normally expect." *Id.* at 412. This is not true of the information presented by petitioners.

16. First, several factors which were critically important to the waiver in *KCST-TV, Inc.* are absent here. For example, in *KCST-TV, Inc.* the community in question was located in the portion of the measured area farthest from the station in question, and thus likely to have less viewing of the station than the market as a whole. *Id.* at 412 n.9. In the present case, the communities in question are located fairly centrally in the area measured (Riverside County Central) and not far beyond the stations' predicted Grade B contours. Indeed, petitioners' own submitted data would place the Los Angeles stations' predicted Grade B contours even closer to or over the communities in question, making off-air viewing of the signals even more likely.[12] Additionally, petitioners claim that Riverside County Central is a small area, thus making county-wide data more reliable. Petitioners note, too, that Arbitron's current Riverside County Central designated area is smaller than before, because Arbitron, after 1972, excluded the western portions of the Commission's designated area for Riverside County Central, which are closer to Los Angeles. While this may make current county-wide data incrementally more congruent with community specific data, there still remains a significant portion of Riverside County Central beyond the boundaries of the communities in question. Petitioners' approach stands in sharp contrast to the zip code analysis performed in *KCST-TV, Inc., supra,* which provided the necessary precision to reliably replace traditional community-specific survey data. Based upon the foregoing, we are not persuaded that petitioners' general market-wide information is tantamount to system-specific data so that it could be accepted pursuant to *KCST-TV, Inc., supra. See also Russell-Rowe Communications, Inc., supra.*

17. Further, petitioners have not established that community- or system-specific surveys are infeasible. Even assuming a cable penetration rate of 90 percent, there is no showing that a survey of noncable homes is impractical using the remaining unwired homes in the pertinent communities. In any event, the cable penetration estimate that petitioners present for Riverside Central as a whole does not suggest that individual cable communities are at that level. Thus, for example, the record reflects the unrebutted contention that cable penetration in the Desert Hot Springs community served by Cablevision is only 67.5 percent, leaving a substantial population of over-the-air viewers from which to obtain the necessary data for a community-specific study.[13] Nor can we give great weight to petitioners' claim that the cost of conducting such surveys would be too burdensome. As noted by Cablevision and Palmer, petitioners submit no specific data concerning their current economic condition.[14] We note, too, that both KMIR-TV and KESQ-TV have previously commissioned special studies in conjunction with requested rule waivers, *see Desert Empire Television Corporation,* 91 FCC 2d at 1183; *Desert Empire Television Corporation,* 86 FCC 2d at 645, in times of claimed financial distress. It has not been demonstrated that the two stations, individually or jointly, cannot do so again today. *See generally KCST-TV, Inc.*, 103 FCC 2d at 412.

18. We continue to believe, consistent with our decision in *KCST-TV, Inc., supra,* that community-specific showings rather than county-wide showings are an inherently more reliable means to establish a signal's significantly viewed status. Petitioners have not demonstrated good cause to deviate from that approach. We find, therefore, that grant of KMIR-TV's and KESQ-TV's petition is not in the public interest.

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[11] We do not believe that petitioners are estopped or precluded from raising the issues herein. New evidence is submitted not previously available. KESQ-TV is more fully a participant than in *Desert Empire Television Corpo ration, supra.* Moreover, the policy underlying our program exclusivity rules has been significantly modified. *See Gen. Docket No. 87-24, supra.* "Issue preclusion does not apply... when the issue decided by an earlier proceeding differs substantially from the issue at hand." *Mayeske v. International Association of Fire Fighters,* 905 F.2d at 1553.

[12] We note further that prior studies of viewing in this area by petitioners have shown that at least one of the Los Angeles signals (KNBC-TV) was in fact viewed over the air at the significantly viewed level. *See Desert Empire Television Corporation,* 86 FCC 2d at 649. Nothing in the record here suggests any change that would reduce the availability of that signal in the communities in question.

[13] Data from the *Television and Cable Factbook* (1991 Edition) show Warner's penetration rate among homes passed to be 81 percent, Cablevision's to be 71 percent, and Palmer's to be 74 percent.

[14] It is also not certain that the costs of the studies in question need be as high as suggested by petitioners, which claim is based upon only a single source. *See, e.g., Russell-Rowe Communications, Inc.*, 7 FCC Rcd at 2527 n. 6.

19. Accordingly, IT IS ORDERED, pursuant to § 0.283 is the Commission's Rules, That the petition for special relief (CSR-3571) filed June 11, 1991, by Desert Empire Television Corporation and Gulf-California Broadcast Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JEMEZ MOUNTAIN BROADCASTERS — File No. BPH-880310MI

For a Construction Permit for a
New FM Station on Channel 234C
at Santa Fe, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; **Released: July 1, 1992**

By The Commission:

1. The Commission has before it an Application for Review, filed February 27, 1991, by Jemez Mountain Broadcasters ("Jemez"), and an Opposition thereto, filed March 18, 1991, by John Strelitz ("Strelitz").

BACKGROUND

2. By *Public Notice*, Report No. W-33 (released February 1, 1988), the Commission opened a filing window for applicants proposing operation on Channel 234C at Santa Fe, New Mexico. The window closed on March 10, 1988. Jemez, one of two applicants who timely submitted applications during this window, proposed a transmitter site which was short-spaced to Station KZRR-FM, Albuquerque, New Mexico. Accordingly, Jemez requested a waiver of § 73.207 of the Commission's Rules.

3. The Commission staff determined, however, that the Jemez application was unacceptable for filing. By letter, dated February 6, 1989, the Chief, FM Branch, advised Jemez that its request for a short-spacing waiver was deficient because Jemez had failed to provide any extrinsic evidence to support its contention that no fully-spaced or lesser short-spaced sites were available.[1] The letter also informed Jemez that, because the only other mutually exclusive application also was being returned,[2] the Commission intended to open a new window for interested parties to file applications for the Santa Fe allotment. The letter, at p. 2, invited Jemez to refile its application with any appropriate revisions at that time.[3]

4. By *Public Notice*, Report No. FCFS-13 (released March 6, 1989), the Commission announced that applications proposing operation on Channel 234C at Santa Fe could be filed as of March 13, 1989. Four new applications were submitted during the second window, but Jemez was not among them. Rather than file its application anew with appropriate revisions to satisfy the Commission's express concerns about its initial short-spacing waiver request, Jemez filed a Petition for Reconsideration of the staff action returning its application.

5. Three of the four applications that were filed during the second window were eventually designated for a comparative hearing in *Hearing Designation Order*, 6 FCC Rcd 497 (M. M. Bur. 1991) (*"HDO"*).[4] Although the three applications proposed fully-spaced transmitter sites, none complied with § 73.315(a) of the Commission's Rules. Accordingly, the *HDO* specified a city coverage issue against each. The *HDO* also denied Jemez' Petition for Reconsideration. Jemez subsequently filed the subject Application for Review.

6. During the pendency of Jemez' Application for Review, the comparative hearing involving the three mutually exclusive applicants proceeded in the ordinary course. *See* MM Docket No. 90-621. The case ultimately was settled, and in *Summary Decision of Administrative Law Judge Richard L. Sippel*, 6 FCC Rcd 5107 (ALJ 1991), a construction permit was granted to one of them, John Strelitz.

7. Jemez claims that because of severe limitations involving the availability of suitable transmitter sites, all of the applicants who applied for the Santa Fe allotment were faced with the same dilemma of complying with either § 73.315 of the Commission's Rules (which requires a station to place a minimum signal strength of 70 dBu over the community of license) *or* § 73.207 (which requires a minimum distance separation between adjacent channel stations). According to Jemez, while the other three applicants chose to address the predicament by proposing fully-spaced sites from which deficient city coverage would be provided, Jemez chose the option of providing full city coverage from a site that is short-spaced.

8. Jemez argues that the situation here is precisely the same as that in *Naguabo Broadcasting Co.*, 3 FCC Rcd 4634 (M. M. Bur. 1988). In *Naguabo*, a significant site restriction created an inextricable link between spacing and city coverage; that is, the applicants were able to

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[1] The following is the complete text of the Jemez short-spacing waiver request:

> The applicant seeks a waiver of Section 73.207 of the Commission's rules to permit short-spacing to commercial FM broadcast station KZRR, Albuquerque, New Mexico. As is clear from Exhibit SFA-1-FM, the proposed site is 8 kilometers closer to KZRR than is permitted by the rules.
>
> The location of Santa Fe, the requirement for height above average terrain for a Class C facility such as that for which the applicant is applying, and the fact that all of the suitable sites are located on U.S. Forest Service land, makes location of a suitable nonshort-spaced site not possible. The Forest Service limits the locations on land which it controls at which communications facilities can be located. The only other suitable site suggested by the Forest Service was one at which the short-spacing would be more severe than at the present site.
>
> In light of the foregoing, grant of a waiver to permit operation at the present site is appropriate, and would serve the public interest.

[2] That application was returned because of a discrepancy between the coordinates contained in the application and those plotted on the topographic site map.

[3] In a separate letter, dated February 6, 1989, the Chief, FM Branch, also invited the other applicant to refile its application with any appropriate revisions.

[4] The fourth applicant was dismissed for reasons which are unrelated to the matters discussed herein.

satisfy § 73.207 *or* § 73.315, but not both. Accordingly, the Commission designated all of the applications for hearing. Jemez argues that such an inextricable link exists here, and, because the other three applicants in MM Docket No. 90-621 were designated for hearing, Jemez should have the same opportunity to demonstrate the merits of its proposal. Jemez also argues that because the other applicants provided no more evidence than did Jemez in support of their city coverage waiver requests, the exclusion of Jemez from participating in the hearing constituted disparate treatment of similarly situated applicants, in violation of *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965).

9. Jemez also asserts that equitable factors should be taken into consideration in determining whether to grant the instant Application for Review. Specifically, Jemez points to the fact that it was represented at the time it prepared and filed its application by an attorney who has since been disbarred from practicing law before the Commission. According to Jemez, the attorney failed to prepare an adequate short-spacing waiver request despite pleas to do so by Jemez' Secretary/Treasurer, Jeffrey R. Kline.

DISCUSSION

10. The question before the Commission is whether the staff action returning the Jemez application as unacceptable for filing was appropriate as a matter of law. Based on *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), we find that the staff action was appropriate.

11. In *WAIT Radio*, the Court emphasized that a party requesting a waiver "must articulate a specific pleading, and adduce concrete support, preferably documentary." 418 F.2d at 1157, n.9, *citing Pikes Peak Broadcasting v. FCC*, 422 F.2d 671, n.8 (D.C. Cir. 1969). In determining whether a waiver of the distance separation requirements is justified, the Commission "has consistently focused on the threshold question of whether there are any suitable fully-spaced or less short-spaced sites available and, if not, whether the public interest benefits are sufficiently compelling to offset the magnitude of the spacing deficiency proposed." *Tri-Valley Broadcasting Co.*, 66 RR 2d 1046, 1048 (1989).

12. In the instant case, Jemez failed to substantiate its assertions that there were no fully-spaced or lesser short-spaced transmitter sites available. For example, there were no corroborating statements from realtors, landowners, governmental agencies, or consultants to buttress Jemez' claims. In the absence of specific, concrete information, the staff action returning the Jemez application was entirely appropriate.

13. We also believe that Jemez' reliance on *Naguabo Broadcasting Co.*, 3 FCC Rcd 4634 (M. M. Bur. 1988), is unfounded. While it is true that in *Naguabo* we designated all of the applications for hearing because of the apparent link between coverage and spacing, all of the applications in that case were filed during the same window and, thus, were mutually exclusive. That is not the case here. Jemez is essentially seeking "reinstatement" of its application, which was filed during the first window, in a proceeding with applications that were filed during the second window. Since Jemez did not refile during the second window, it had no application pending which was mutually exclusive with the other applicants for the Santa Fe allotment. As a consequence, there is no justification for allowing Jemez to compete with the other applications in MM Docket No. 90-621. Moreover, since Jemez was not similarly situated, Jemez cannot claim that it received disparate treatment, in violation of *Melody Music, supra.*

14. Finally, there is no merit to Jemez' plea for equitable consideration. A licensee is responsible for its actions, even if taken upon the advice of counsel. *WHW Enterprises, Inc. v. FCC*, 753 F.2d 1132, 1142 (D.C. Cir. 1985). Thus, our ultimate conclusion herein is not altered because Jemez was initially represented by an attorney who has since been disbarred. Moreover, in the letter returning the Jemez application, the staff advised Jemez in no uncertain terms why its short-spacing waiver request was deficient and what Jemez should do in order to resolve the apparent deficiencies. The staff letter expressly invited Jemez to refile its application "with any appropriate revisions" during the upcoming new window. Since the Jemez application was properly returned following the first window, its failure to refile during the second one constituted a fatal decision for which there is no Commission remedy.

15. ACCORDINGLY, IT IS ORDERED That the Application for Review, filed February 27, 1991, by Jemez Mountain Broadcasters, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-311

In re Applications of

SALT CITY COMMUNICATIONS, INC. File No. BPH-870918MN

D.J.'S BROADCASTING CO. File No. BPH-870918MY

For Construction Permit for
New FM Station, Channel 290A,
Syracuse, New York

Appearances

David Honig, Esquire, on behalf of Salt City Communications, Inc.; and *Dennis J. Kelly, Esquire*, on behalf of D.J.'s Broadcasting Co.

DECISION

Adopted: June 23, 1992; Released: July 7, 1992

By the Review Board: ESBENSEN and GREENE; MARINO (Chairman) dissenting.

Board Member GREENE:

1. Before the Review Board is the *Initial Decision*, 6 FCC Rcd 7160 (1991)(I.D.), of Chief Administrative Law Judge (ALJ) Joseph Stirmer. Only the two captioned applicants remain as parties to this proceeding,[1] and only D.J.'s Broadcasting Co. (D.J.) has filed exceptions. The prevailing applicant below, Salt City Communications, Inc. (Salt City) filed a Statement in Lieu of Exceptions.[2]

2. The relevant remaining (renumbered) issues upon which the hearing was held, in addition to the standard comparative issue, were as follows:

> 1. To determine whether D.J.'s proposal would provide coverage of the city sought to be served, as required by Section 73.315(a) of the Commission's rules, and, if not, whether circumstances exist which warrant waiver of that Section.
>
> 2. To determine whether there is a reasonable possibility that the tower height and location proposed by Salt City and D.J.'s would constitute a hazard to air navigation.
>
> 3. To determine whether Salt City has reasonable assurance of financing from MBIC [Minority Broadcast Investment Corporation], under what terms and conditions will that financing be provided, and whether Salt City is willing and able to meet these terms and conditions.
>
> 4. To determine, based on the evidence adduced under the foregoing issue, whether Salt City is financially qualified to be a Commission licensee.

3. The coverage question in issue 1 was resolved in D.J.'s favor. *See Memorandum Opinion and Order*, FCC 89M-2254, released September 12, 1989. The air hazard question in issue 2 was favorably resolved with respect to both remaining applicants, *see* I.D., paras. 123-124, with an appropriate condition added to the grant of Salt City's construction permit concerning electromagnetic interference. No exceptions have been taken to the resolution of these issues, and these matters are therefore final. *See* 47 C.F.R. 1.276(a) (any objection not saved by exception is waived); *Opportunity Broadcasting of Shreveport*, FCC 92R-43, released June 1, 1992, at para. 3. The financial qualifications questions of issues 3 and 4 were resolved favorably to Salt City, and Salt City was found to be the superior comparative applicant. I.D., paras. 122, 132. D.J. has excepted to these conclusions and requested oral argument. We have reviewed the I.D. in light of the exceptions and underlying record and conclude that the ALJ's distillation of the evidence under the decisional financial issues would not be materially aided by oral argument. We agree with D.J., however, that Salt City is not financially qualified to be a Commission licensee and that, D.J., which is the only remaining basically qualified applicant, is therefore entitled to grant of the construction permit.[3] We turn first to a summary of the ALJ's key factual findings, which are not excepted to by any party.

FINDINGS OF FACT

4. Salt City is a corporation with the following stockholders: Merrill Charles, Locksley Spencer and Roosevelt Bouie. Charles holds a 49-1/3% equity interest in the corporation and is the corporation's sole voting stockholder. In addition, Charles is the Chairman, President, Treasurer, and the only Director of Salt City. Spencer, and Bouie each hold 25 1/3% non-voting equity interests in the corporation. Carol Charles, Merrill Charles' wife, is the Secretary of the corporation. Salt City Exh. 1; I.D., paras. 50-52.

5. Salt City has at all times relied upon financing to be furnished by Minority Broadcast Investment Corporation (MBIC). Because the terms and conditions relating to this financing changed during the course of the pendency of the Salt City application, the ALJ specified an issue to determine whether Salt City had reasonable assurance of financing from MBIC, under what terms and conditions, and whether Salt City is willing and able to meet those terms and conditions. *Memorandum Opinion and Order*, FCC 90M-1165, released May 16, 1990. Specifically, at the time it filed its original application, Salt City relied upon a September 17, 1987, letter from MBIC to Merrill B. Charles, III. The key provisions of this letter are as follows (Albert Exh. 9):

> . . . MBIC wishes to confirm its present intention to provide and assemble a $600,000.00 financing, through a group of lenders which will be formed by MBIC as the lead investor, in the event your pending application for a construction permit is granted by the Federal Communications Commission.

> The exact terms and interest rate on the loan will be determined at the time of disbursement and will also depend on economic conditions. It is anticipated that the loan would be structured as follows:
>
> The loan will be in the form of a seven (7) year long term senior loan, with a moratorium on the payment of principal only for a twenty-four (24) month period. Thereafter, for a sixty (60) month period principal and interest will be paid on a quarterly basis. Further, a pledge of SSC's stock as well as the personal guarantees of the company's principals will be required.
>
> We understand that for purposes of your FCC filing you are required only to show reasonable assurance of your financing and you do not require nor presently desire a legally binding commitment for which this corporation would charge a commitment fee. Accordingly, the final decision on the availability of the loan and its terms will of necessity be made at the time the loan is actually to be funded and will depend upon our review of your financial condition and proposal at that time as well as MBIC's then current lending policies as well as general financial market condition.

6. This letter was signed by Walter Threadgill, President, Chief Executive Officer, Chief Investment Officer, and majority owner of MBIC (Tr. 1322; Salt City Exh. 8). Prior to receiving this letter, Charles spoke to Threadgill several times on the telephone. Also, Charles had previously prepared a 42-page business plan for Salt City and had sent that to Threadgill some six weeks prior to filing the application (Tr. 1130). Charles and Threadgill spoke in general about what the letter would contain, and then Threadgill sent Charles the letter (Tr. 1131). Charles did not send financial information about himself or the other stockholders to Threadgill. (Tr. 1132, 1324-1325). At the time the letter was written, Threadgill did not propose to Charles the specific collateral requirements of MBIC, although, as indicated in the letter, personal guarantees and a security interest in the station were required (Tr. 1132, 1327-1328). According to Threadgill, he was not concerned about financial statements with respect to the individuals because the people MBIC finances are not individuals with "lofty" balance sheets (Tr. 1324). I.D., paras. 66-67.

7. During their discussions, Charles answered numerous questions from Threadgill concerning his background, the background of the other principals, and his plans for operating the station. I.D., para. 68. Before issuing the letter to Salt City, Threadgill conducted an analysis of the Syracuse market. He also considered the business plan written and submitted by Charles, and whether there were other possible new stations which would have an impact on the proposed Salt City station to evaluate the business plan's opportunity for success. Threadgill also considered where Charles had been employed, and whether he had a generalized knowledge of the industry (Tr. 1335-1336). Threadgill was satisfied that the Salt City proposed loan was one that he would make. He was satisfied as to the quality of the marketplace and the quality of Charles (Tr. 1335-1336), and, as a result, Threadgill was willing to provide $600,000 in financing to Salt City (Tr. 1341). I.D., para. 69.

8. Charles and Threadgill also discussed the possibility of MBIC requiring an equity participation in Salt City prior to the filing of the Salt City application (Tr. 1133). In September 1987, Threadgill made it clear to Charles that equity in Salt City had to be made available (Tr. 1134), but he did not state this requirement in the September 11, 1987 MBIC letter. According to Threadgill, the letter was not meant to be all encompassing; it was a letter that was meant to provide only "reasonable assurance" to Charles that MBIC would make funds available. The letter represented, in Threadgill's mind, his "reasonable assurance" to Charles that should Charles secure a construction permit for the station, MBIC would finance the transaction (Tr. 1333). Further, following the issuance of the September 17, 1987 letter, MBIC twice requested status reports from Salt City. Salt City provided the required updates to MBIC on May 25, 1989, and December 13, 1989. I.D., paras. 70-71.

9. The September 1987 letter was followed up by a letter to Charles from Threadgill, dated March 21, 1990. This letter stated, in pertinent part, as follows (Albert Exh. 14; I.D., para. 72, and n.14):

> We are confirming that [the September 17, 1987 letter] has remained in effect, and will continue to be in effect until such time as a decision is made by the FCC on SCC's [Salt City's] application with the following changes and/or additions:
>
> 1. MBIC will have a right of first refusal to provide financing for construction and initial working capital for the station. That is, in the event any offer to finance your station is made prior to MBIC's furnishing financing, MBIC shall be shown such offer and shall have 30 days in which to elect to match it. If it does, then SSC shall proceed with MBIC and not any other offeror.
>
> 2. The anticipated terms of the loan, were it to be made now, would be as follows. MBIC would provide $550,00 [sic] and SCC's stockholders would provide SCC with $75,000 in cash, as SCC's equity contribution. Within 30 days thereafter, they will also give [Salt City] a note for $25,000 with interest at 14%, interest to be deferred and added as due to principal until the fifth anniversary of the loan, when all principal and interest due shall be payable.
>
> 3. As SCC draws down the loan proceeds, MBIC will acquire warrants to purchase SCC's stock, with appropriate safeguards against dilution for 75% of the outstanding stock. The stock will be in every respect the same as other SCC shares except that it will be non-voting. The price of the warrants in the aggregate shall not exceed $1,000.
>
> 4. The only personal guarantees that will be required will be those of yourself [Merrill B. Charles] and your wife.
>
> 5. A financing fee of 2% of the entire amount of the loan will be paid to MBIC when SCC first draws down any part of the loan.
>
> 6. In the event that SCC, through no fault of MBIC, does not draw down all of the loan, within three months of issuance of a firm FCC construction permit, it shall pay to MBIC a fee of $100,000; this may be paid in cash or by giving MBIC a promissory note for such amount in form acceptable to MBIC,

payable at 14% interest over a five year period, with principal and interest amortized as if the note were to be repaid over a seven year period, with a ballon [sic] payment in the fifth year, commencing on the date SCC notifies MBIC that it, SCC, will not draw down all of said loan as provided above, or when said three months have expired without said loan having been so drawn down.

10. As noted, this March 1990 letter required Salt City stockholders to provide to Salt City $75,000 in cash as Salt City's equity contribution. This infusion of capital was necessary in order to eliminate the original requirement that the non-voting stockholders personally guarantee the loan. (Tr. 1145-1146). Because Charles knew that the March 1990 letter would require additional equity contributions from the shareholders of Salt City, he verified from Bouie and Spencer that they would be willing and able to make those commitments. Charles spoke with each, and both confirmed to him that they could and would meet all conditions contained in the March 21, 1990 letter, including dilution of their equity positions if MBIC exercised its warrants and payment of $24,750 each (Salt City Exh. 12). Because Carol Charles' personal guarantee is required by MBIC's March 1990 letter, she confirmed in writing that she also agreed to MBIC's terms (Salt City Exh. 12). Charles was also ready and able to meet his share of those commitments, including contributing $49,500 to Salt City. (Salt City Exh. 11). I.D., paras. 74-75, 77.

11. In mid-June 1990, Charles executed a memorandum to Salt City's shareholders, memorializing, *inter alia*, that he had received $13,000 and a promise of an additional $37,000 from his mother, Ethel Charles, to permit him to meet his $49,500 financial obligaions to Salt City in connection with the March 21, 1990, MBIC letter (Tr. 1119; Salt City Exhs. 11-12). Ethel Charles is the Director of Social Services for Brookdale Hospital and has an annual income of $61,000. Mrs. Charles also has unencumbered properties with an estimated value of $200,000. These properties include two residences and a lot. Charles has spoken to his mother and has been informed that she will raise the money needed to meet her commitment to her son by using available cash and by mortgaging her house (valued at $140,000), which she owns free and clear. Additionally, Locksley Spencer's individual financial statement shows the availability of total current assets of approximately $490,000 and total current liabilities of $339,009. The statement shows that Spencer for the year July 1, 1989, to March 31, 1990, made an operating profit of $123,353. Also, Spencer has real estate, purchased in 1979 for $165,000 and valued at $550,000 in June 1990. (Salt City Exh. 14). Roosevelt Bouie's financial statement shows cash on hand and on deposit of $240,000. He has a net worth in excess of $800,000 and liabilities of $132,000 (mortgage) and a contingent liability of $17,000. I.D., paras. 78-80.

12. On June 20, 1990, Threadgill wrote another letter to Salt City clarifying the March 21, 1990 letter. The key provisions of this subsequent letter are as follows (Salt City Exh. 10):

> 1. MBIC would expect to pay an aggregate exercise price for the warrants of $1,000. This sum would be paid to Salt City by MBIC at the time of exercise (i.e., exchange the warrant for stock).
>
> 2. MBIC expects Salt City to repay the $550,000 loan whether or not MBIC exercises its warrant. If the loan were made today, MBIC would charge 14% interest. That rate is subject to change based on conditions then existing. We call your attention to the fact that MBIC is regulated by the Small Business Administration, and may not charge interest in excess of that permitted. Concurrently, the SBA's maximum is 15.25% for such loans. We expect that any loan would be amortized over a 7-10 year period. MBIC would allow a 2-3 year moratorium on principal, so that Salt City would pay interest only in the early years.
>
> 3. MBIC's documents contain put and call provisions. Beginning a fixed number of years (3-5) after the Warrant is issued, Salt City will have the right to require MBIC to sell some or all of its warrant to Salt City, and MBIC will have the right to require Salt City to buy back some or all of MBIC's warrant. This put/call would operate as follows:
>
> (a) Before any call (but not put), Salt City would have to retire any remaining portion of its original $550,000 indebtedness to MBIC.
>
> (b) The put/call price is the market value of the warrant (or stock, if the warrant has been exercised). If Salt City and MBIC are unable to agree on the market value of the warrants, each chooses an appraiser and their findings are averaged, unless the higher one is over 20% more than the lower, in which case the appraisers select a third one, whose appraisal is conclusive.

13. Also, in this letter, Threadgill informed Charles of the changes in the financial markets that had occurred since his first letter in 1987. Specifically, Threadgill detailed (Salt City Exh. 10):

> In the period of nearly three years since the 1987 letter, major changes took place in the capital markets. Leveraged buyouts fared badly, junk bonds were no longer seen as answers, and the savings and loan industry entered a crisis period. The problems of investing venture capital wisely increased greatly, to put it mildly; major Wall Street firms suffered severe setbacks, and a profitable investment firm became a rarity.
>
> MBIC and other Mesbics have thus been put in the position of having to seek more equity, and senior creditor status, to offset the greater risk of loss of all or part of the investment.

14. As indicated in the September 17, 1987 letter, it was always Threadgill's intention to syndicate part of the financing for Salt City. Before issuing that letter, however, Threadgill did not talk to any other lenders about financing Salt City's application. He expected that there would be a minimum of two and a maximum of four other lenders required. The decision as to how many and which lenders would be used would be made at the time the loan was made. Threadgill could not state with certainty the

amount of the financing that MBIC itself would provide. At the time of the September 17 letter, MBIC's maximum legal lending limit was $300,000. Today MBIC's maximum legal lending limit is $400,000. According to Threadgill, it is a routine practice for MESBICs to participate in this type of financing. Tr. 1347-1351; I.D., para. 83.

15. In a written declaration, Threadgill further explained MBIC's reasons for proceeding as it did with Salt City. The declaration states, in pertinent part, as follows (Salt City Exh. 8):

> I wrote the March 21, 1990 letter to Salt City for two reasons. First, I was advised that Salt City was getting closer to the time when a license might issue. Salt City has always been eager to win this broadcast permit, and thus I felt it appropriate to revisit and possibly refine the 1987 letter.
>
> The second reason I wrote the March 21, 1990 letter was that I had had the experience of spending a great deal of time and effort doing market research with respect to applicants for which I'd written reasonable assurance letters, with no income or gain whatsoever for MBIC. What often happens is that if such applicants win broadcast permits, they take our reasonable assurance letters to other lenders, and then use them for funds. MBIC is in business to lend money, and I wanted some protection to be sure that since we had worked with Salt City for such a long time, our efforts would result in a profit for MBIC as well as for Salt City.
>
> That is why the March 21, 1990 letter contains a penalty for the use of other funds, although the penalty as negotiated was such that it would not be so large as to entirely preclude Salt City from using any other source of funds. Furthermore, the letter contains a right of first refusal, so that MBIC still would have to match other lenders' terms. Thus the letter is entirely fair.
>
> The broadcast lending market in 1990 is somewhat different, and much more conservative, than the broadcast lending market in 1987. It is still possible to syndicate a $550,000 loan for a major market FM startup. However, it did not seem wise to offer Salt City financing that MBIC could not syndicate. The letter I wrote on March 21, 1990 represents a commmitment which is fair, and which reflects current reality in broadcast venture lending. The letter provides that MBIC will have warrants to acquire up to 75% of Salt City's stock. All of that stock would be nonvoting. Under the SBA's rules, none of the warrants can be exercised for three years after the station signs on the air.
>
> The 25%/75% equity split for the warrants reflects changes in the broadcast financial markets since mid-1989. As is commonly known, many broadcasters bought their stations in the mid-1980's for 12-14 times cash flow. These multiples were often far too high, and many of these stations drowned in debt service. Consequently, in 1989 most lenders, especially smaller and thus more vulnerable lenders such as MBIC, began to require warrants for higher percentages of nonvoting stock. Before mid-1989, MBIC and the other MESBICs typically would have required warrants for 60% of the stock of a startup company doing its first deal.
>
> The number now most commonly used is 75% for first-time startups. There are four MESBICs presently offering financing to minority broadcast entrepreneurs: MBIC, BROADCAP, Syndicated Communications, Inc. (SYNCOM) and CVC Capital Corp. I am familiar with the terms of loans and investments made by each. The terms of the financing to be provided pursuant to the March 21, 1990 letter I wrote to SSC [Salt City] are in line with those of other MESBICs.
>
> All lenders prefer operators with proven broadcast operating track records. Salt City does not have such a record now. If Salt City does well, it will be in a position to get money on more favorable terms.
>
> Broadcast lending is especially risky for first time buyers and startups. Obviously a license cannot be pledged or treated as an asset. Therefore, the only assets which can be pledged as collateral for loans are hard assets such as transmitters and equipment. These items depreciate rapidly, and are never worth anywhere near the value of the station, since that includes the value of the license as well.
>
> Furthermore, conditions in the real estate market, fueled in large part by the failure of so many savings and loan companies, has caused much if not all subordinated equity money otherwise available for syndication in broadcast lending to dry up. Thus, in order to continue to find reasonable assurance to Salt City under present market conditions, MBIC had to maintain its commitment in force under terms realistic for 1990, not terms realistic for 1987.
>
> These market conditions require lenders to exercise great care in putting together highly leveraged broadcast transactions. MBIC has exercised that caution, but has done so in a way which still permits Salt City's present stockholders to retain a substantial percentage of equity and which allows MBIC absolutely no voting power.

16. Based upon all of the foregoing, the ALJ concluded that the record established the terms and conditions under which MBIC will make a loan of $550,000 available to Salt City; that Salt City's stockholders are willing and able to meet the terms and conditions of the MBIC loan; and that Salt City has reasonable assurance of financing and is thus financially qualified to be a licensee. I.D., para. 115.

EXCEPTIONS

17. In its exceptions, D.J. largely reiterates the same arguments it presented to the ALJ. Specifically, it asserts that, at the time of certification, Salt City was not financially qualified because it had not furnished MBIC with sufficient information to establish the credit-worthiness of its principals; that it did not discuss or agree upon collateral terms; that the 1987 financing letter did not flesh out MBIC's requirements as to stock warrants and capital injection; and that Salt City's stockholders had not agreed to the terms of the loan. D.J. also contends that the proposed financing exceeds MBIC's lending limit and MBIC has not talked to other potential syndicate members. D.J. argues that, in crediting this arrangement despite these deficiencies, the ALJ did not follow the Commission's reasonable assurance guidelines and carved out a more lenient financial standard for minority applicants. Finally, D.J. con-

tends that the ALJ also erred in permitting Salt City to present evidence at the hearing of a revised financial plan, as reflected in its March 1990 letter from MBIC, even though Salt City has not amended its application to substitute new financing.

DISCUSSION

18. As indicated above, the ALJ added a tripartite financial issue against Salt City inquiring into whether the applicant has reasonable assurance of financing from MBIC, under what terms and conditions the financing will be provided, and whether Salt City is willing and able to meet those terms and conditions. We agree with the ALJ that the latter two portions of the issue have been satisfied. That is, the findings establish the terms and conditions under which MBIC will make a loan available to Salt City, as set forth in the September 17, 1987 letter and refined and explained in the March 21 and June 20, 1990 letters. I.D., paras. 66, 72, 81. There is no dispute on this point. Moreover, the record also demonstrates that Salt City's principals are willing and able to meet all of MBIC's requirements, including additional equity contributions, dilution of their equity portions if MBIC exercises its warrants, and the provision of personal guarantees. I.D., paras. 74-80. Where we part company with the ALJ, however, is over the core question of whether Salt City has reasonable assurance of financing from its chosen lender, MBIC.

19. In accordance with the Commission's financial certification procedure in effect at the time Salt City filed its application, Salt City was required to have reasonable assurance of sufficient funds to construct and operate its station for three months without reliance on revenues at the time it certified *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 (1989), *recon. denied*, 5 FCC Rcd 3075 (1990), *aff'd*, No. 90-1291 (D.C. Cir. July 12, 1991). To establish sufficient available funds to meet anticipated costs, an applicant may rely on net liquid assets on hand or committed sources of funds such as loans from financial institutions or other lenders. *Id.* at 5519. The certification process did not alter the substantive law governing financial qualifications. *Revision of Form 301*, 50 RR 2d 381, 382 (1981). Traditionally, applicants relying on loans have submitted commitment letters from the lenders to establish reasonable assurance of the funds' availability. *See, e.g., Jay Sadow*, 39 FCC 2d 808, 810 (Rev. Bd. 1973). Such loan commitment letters, ordinarily from banks, which recited the significant terms and conditions agreed upon, were a generally accepted form of assurance, absent a showing undermining the validity of the letter or the bank's ability to make the loan. *McCreary Broadcasting Corp.*, 27 FCC 2d 964, 966 (Rev. Bd. 1971). Thus, whereas pre-certification cases focused largely on whether loan commitment letters were complete on their face, *e.g., Orange Nine, Inc.*, 7 FCC 2d 788, 789-90 (1967); *Jay Sadow*, in more recent times the Board has noted the phenomenon of "accommodation" letters issued by lenders to virtual strangers on the basis of little meaningful information about the borrowers. In response to these instances, the Board has recast the relevent inquiry in the following terms:

> Thus, in order for the Board to determine that an applicant has "reasonable assurance" of "committed sources of funds" from a lending institution, we will review the following factors: Whether (1) the bank has a long and established relationship with the borrower sufficient to infer that the lender is thoroughly familiar with the borrower's assets, credit history, current business plan, and similar data, *see Multi-State Communications, Inc. v. FCC*, 590 F.2d 1117 (D.C. Cir. 1978); or, (2) the prospective borrower has provided the bank with such data, and the bank is sufficiently satisfied with this financial information (*e.g.*, collateral guarantees, *see Chapman Radio and Television Co.*, 70 FCC 2d 2063, 2072 (1979)) that, *ceteris paribus*, a loan in the stated amount would be forthcoming, and that the borrower is fully familiar with, and accepts the terms and conditions of the proposed loan (*e.g.*, payment period, interest rate, collateral requirements, and other basic terms). Short of these ordinary fundamentals, it would be difficult to infer "reasonable assurance" from a "committed source." In other words, central to any successful "reasonable assurance" showing of a loan from a financial institution is that the "individual qualifications" of the borrower have been preliminarily reviewed, *Christina Communications*, 2 FCC Rcd 1971, 1974 (1987), that adequate collateral has been demonstrated, *Chapman Radio, supra*, and that the tentative terms of the loan are specifically identified and are satisfactory to both borrower and lender.

Scioto Broadcasters Limited Partnership, 5 FCC Rcd 5158, 5160 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1893 (1991); *accord, Mableton Broadcasting Co., Inc.*, 5 FCC Rcd 6314, 6322 (Rev. Bd. 1990). We see no reason not to apply the same general principles here, where the lender is not a financial institution.

20. We find that, in most but not all crucial respects, Salt City has satisfied current standards. Although it does not fit the first *Scioto* criterion because Salt City had not previously dealt with MBIC, it does meet the alternative *Scioto* test insofar as Salt City provided sufficient data about itself to satisfy MBIC, and, in turn, Salt City knew and accepted MBIC's conditions. Thus, prior to issuance of the September 17, 1987 letter, MBIC requested and obtained from Charles a detailed 42-page business plan for Salt City; Threadgill questioned Charles closely about himself and the other Salt City principals and about their plans for operating the station; and Threadgill conducted a study of the local Syracuse market. Individual financial statements were specifically not required. Also, subsequent to issuance of the letter, Salt City, at MBIC's request, provided two status reports. Charles, Salt City's 100% voting stockholder, principal equity owner, Chairman, and sole Director, negotiated the terms of the loan on behalf of Salt City and clearly accepted them. When the terms were modified in 1990 to require capital infusions from the non-voting stockholders, Spencer and Bowie, in lieu of personal guarantees, the provision of warrants to MBIC, and the requirement of personal guarantees from Charles and his wife, all of these individuals confirmed that they were familiar with and agreed to these conditions.

21. Because the September 17, 1987 financing letter elaborated on the March 21, 1990 letter, it cannot be said that all "the tentative terms of the loan [were] specifically identified," *Scioto*, 5 FCC Rcd at 5160, at the time of the first letter. The ALJ, who framed the issue, found this not to be a significant defect because it did not mean that Salt

City was not financially qualified when it filed its application. I.D., para. 118. We generally agree. The absence of a particular basic term from a commitment letter is not necessarily fatal if other key provisions are specified and the overall circumstances demonstrate that reasonable assurance is present. *See A.P. Walter, Jr.*, 6 FCC Rcd 875, 877-878 (Rev. Bd. 1991) (repayment terms omitted; collateral "contingent on . . . credit conditions prevailing at the time of such commitment"); *Colonial Communications, Inc.*, 5 FCC Rcd 1967, 1968 (Rev. Bd. 1990) (security not specified), *recon. denied*, 5 FCC Rcd 3797, *rev. denied*, 6 FCC Rcd 2296 (1991), *recon. dismissed*, 7 FCC Rcd 674 (1992); *cf. Harrison County Broadcasting Co.*, 6 FCC Rcd 5819, 5821-22 (Rev. Bd. 1991), *rev. denied*, 7 FCC Rcd 2993 (1992). The September 1987 letter expressed a firm present intention to make the loan, and specified the amount of the loan, the terms of repayment, and stock pledge and personal guarantee requirements. Although the March 1990 letter contained modifications, it specifically confirmed that the earlier letter remained in effect, and Threadgill's June 20, 1990 letter and his hearing testimony (Salt City Exh. 8) explained in great detail why current market conditions mandated the changes. There is nothing in these circumstances to suggest that MBIC was merely accommodating Salt City by writing these letters; indeed, the contrary appears to be true for, as the ALJ found (I.D., para. 118), the final terms were onerous and in MBIC's favor and reflected a good faith adherence to marketplace realities. In short, were this the only defect, we would be strongly disinclined to reverse the I.D. *See Sumter Radio Partners*, 7 FCC Rcd 2573, 2575-76 (Rev. Bd. 1992).[4]

22. Much the same may be said of Salt City's failure to formally amend its application in 1990 to reflect the changes in its understanding with MBIC. We largely agree with the ALJ's characterization of Salt City's March 1990 letter from MBIC as:

> a refinement of the earlier proposal, and as such, [not] a change in financing. The terms and conditions may be somewhat altered but the source of financing remains the same and the basic understanding remains the same insofar as the applicant is relying upon the same lender.

Tr. 1320. Because an applicant must have at the time of certification, and thereafter, a specific financial proposal providing reasonable assurance of sufficient funding, *Aspen FM, Inc.*, 5 FCC Rcd 3196, 3198 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 1602 (1991), if it loses the assurance that a loan letter it relies on is viable, it must (in addition to reporting this fact) amend its application, pursuant to 47 C.F.R. § 73.3522(b), and demonstrate good cause for new financing. *See Texas Communications Ltd Partnership*, FCC 92-219, released May 26, 1992, at paras. 7-8 (where applicant relied on letter from bank that became insolvent, it was required to amend its application in order to rely on replacement letter from new bank); *McClenahan Broadcasting, Inc.*, 5 FCC Rcd 7269, 7270-7271 (Rev. Bd. 1990), *rev. denied*, 6 FCC Rcd 2347 (1991), *recon. denied*, 6 FCC Rcd 5183 (1991). Here, no amendment or good cause showing was required because Salt City never lost reasonable assurance of financing from MBIC and its certification never became invalid.[5]

23. Notwithstanding the above discussion, there remains a core deficiency in Salt City's proposal. At the time of the September 17, 1987 commitment letter, MBIC's legal lending limit was $300,000, far short of the $600,000 it proposed to provide to Salt City. Accordingly, the letter provided that MBIC would "assemble" the financing "through a group of lenders which will be formed by MBIC." MBIC, through Threadgill, however, never spoke to other lenders concerning Salt City's financing, even though he estimated that at least two other lenders would be needed. Threadgill identified two other MESBICs, Broadcap and Syndicated Communications, Inc. (Syncom), as possible participants and stated that other MESBICs routinely take part in this type of financing. I.D., para. 83. The ALJ, distinguishing *KIST Corp.*, 99 FCC 2d 173 (Rev. Bd. 1984), *modified*, 102 FCC 2d 288 (1985), where the Board rejected a commitment letter which greatly exceeded a bank's lending limit, and deferring to MBIC's past experience in syndicating loans with other MESBICs and Threadgill's expertise in arranging financing for minority applicants, held that MBIC's promised financing to Salt City was reasonably available. I.D., para. 120. We are constrained to disagree.

24. The Board has long held that: "[W]hen, as here, it is undisputed that the proposed loan would violate statutory limitations governing the amount a bank may lend, it is incumbent upon an applicant to make a further showing of availability." *CBS, Inc.*, 49 FCC 2d 1214, 1228-1229 (Rev. Bd. 1974). In *CBS*, there was no indication that the bank contemplated or was willing to arrange participation by other banks, or that other banks were interested in participating. *Id.* Where, however, applicants could show that other banks confirmed their willingness to share in the loan to the extent necessary, the proposals passed muster. *Lamar Life Broadcasting Co.*, 26 FCC 2d 112 (Rev. Bd. 1970); *TVue Associates, Inc.*, 5 FCC 2d 419 (Rev. Bd. 1966). More recently, in *KIST*, the Board rejected the contention that the "further showing" requirement of *CBS* is met "simply by submitting evidence that the lead bank issuing the commitment letter is aware that the proposed loan will require the participation of other banks." 99 FCC 2d at 178. *See also Advanced Mobile Phone Service, Inc.*, 52 RR 2d 1593, 1597 (CC Bur. 1983); *cf. Goodlettsville Broadcasting Co., Inc.*, 7 FCC Rcd 1833 (Rev. Bd. 1992) (remand to explore, *inter alia*, whether investment company had ability to provide loan).

25. At a minimum, these cases suggest that an applicant relying on a lender that faces a legal lending limit may not simply rely on the lender's *ipse dixit* that the promised funds will be made available. Some additional step must be taken to provide reasonable assurance that the lender is able to arrange the financing despite its own limitations. On the record before us, it is undisputed that MBIC took no steps beyond asserting its intention to syndicate the loan and even indicated that there would be no decision on which other lenders would be utilized or how much MBIC itself would contribute until the time the loan was made. While we agree with the ALJ that the facts in *KIST* were more egregious than those present here in that, *inter alia*, the proposed loan was many times the bank's credit limit and it was unclear to what extent the bank had previously participated in syndication loans, 99 FCC 2d at 180, nevertheless, it cannot be taken purely on faith here that a shortfall of at least $300,000 - an amount equal to MBIC's lending limit at the time Salt City certified to its qualifications - will likely become available. This is a considerable sum and there is simply no evidence in the record of the willingness and/or ability of other MESBICs to make up this difference.[6]

26. Salt City contends that *Washington's Christian Television Outreach, Inc.*, 94 FCC 2d 1360 (Rev. Bd. 1983), where a minority applicant relying on a bank facing a lending limit was afforded an opportunity on remand to show that correspondent banks would assist in making the loan, should be controlling here. (Reply Br. at 13). In *Washington's Christian*, however, unlike the instant case, the applicant did not have a sufficient opportunity at the original hearing to prove the availability of its financing and the Board remanded to allow it to support its amended financial plan. *Id.* at 1362-1364; *see KIST*, 99 FCC 2d at 181. Here, Salt City had a full opportunity at hearing and Threadgill gave extensive testimony (Salt City Exh. 8; tr. 1314-1373) to prove its financial qualifications. Indeed, the record establishes that there simply has never been a commitment from any other MESBIC to fill in the funds that MBIC itself cannot advance because no effort was made to ascertain the willingness of other MESBICs to do so. Remand would serve no useful purpose here because, at most, Salt City could only produce evidence of what other MESBICs would be willing to do today, rather than what they would have agreed to at the time of certification, when Salt City was required to have reasonable assurance of financing. In short, we conclude that Salt City, faced with MBIC's legal inability to itself provide substantial sums the applicant proposed to rely upon, was required to do more than simply defer to Threadgill's assurance that the shortfall would be available from other sources even though no one has disputed Threadgill's experience in syndicating other loans. Because it failed to do so, we cannot find the applicant financially qualified.[7]

27. ACCORDINGLY, IT IS ORDERED, That the motion to strike reply exceptions, filed February 3, 1992, by Salt City Communications, Inc. IS GRANTED;

28. IT IS FURTHER ORDERED, That the application of D.J.'s Broadcasting Co. (File No. BPH-870918MY) for a construction permit for a new FM station at Syracuse, New York IS GRANTED subject to the following condition:

> Upon receipt of notification from the Commission that harmful interference is being caused by the operation of the licensee's (permittee's) transmitter, the licensee (permittee) shall either immediately reduce the power to the point of no interference, cease operation, or take such immediate corrective action as is necessary to eliminate the harmful interference. This condition expires after one year of interference-free operation.

29. IT IS FURTHER ORDERED, That the application of Salt City Communications, Inc. (BPH-870918MN) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

FOOTNOTES

[1] By *Order*, FCC 92R-7, released January 28, 1992, the applications of Taylor Communications of Syracuse, Inc. and Marc A. Albert, both of which were denied in the I.D., were dismissed for failure to prosecute because they did not file exceptions with the Board.

[2] On February 3, 1992, Salt City filed a motion to strike D.J.'s reply to Salt City's Statement In Lieu of Exceptions. We will grant this motion. Salt City's two-sentence Statement did not constitute a brief as contemplated by 47 C.F.R. 1.277(b) and thus did not afford a right to reply. Moreover, D.J.'s reply, in decisional content, is repetitive of matters already briefed in its exceptions.

[3] In light of this result, it is unnecessary to reach D.J.'s other exceptions which argue that the ALJ erred in awarding Salt City 100% integration credit and in not specifying a real party in interest issue against Salt City. *See Rebecca L. Boedker*, 6 FCC Rcd 2557, 2559 n.2 (1991), *aff'd by judgment*, No. 91-1277 (D.C. Cir. Apr. 26, 1992).

[4] D.J.'s citation to *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990), where the circumstances raised significant questions as to whether the bank letter was a mere accommodation, *e.g.*, the applicant submitted no business plan to the bank and had no understanding of its requirements, is inapposite.

[5] *Marlin Broadcasting of Central Florida*, 5 FCC Rcd 5751 (1990) and *REM Malloy Broadcasting*, 6 FCC Rcd 5843 (Rev. Bd. 1991), relied on by D.J., are not on point. In *Marlin*, the applicant relied merely on a phone conversation with a friend at the bank prior to certification, supplied no documentation, and obtained no commitment --- thus never obtaining reasonable assurance. In *REM Malloy*, the applicant's original loan letter was not addressed to the applicant, did not specify an interest rate or terms of repayment, and the record did not indicate the applicant could meet the bank's collateral requirements. Moreover, a subsequently-obtained letter from the same bank bore "little or no resemblance to the original letter" and included "nearly a 400% increase in the principal amount." *Id.* at 5844. In the instant case, the principal amount was reduced by $50,000 in the March 1990 letter to Salt City.

[6] Although MBIC's lending limit is now $400,000 and the funds to be advanced have been reduced to $550,000, Salt City was required to demonstrate reasonable assurance at the time of its certification when MBIC's lending limit was $300,000 and it was proposing to advance $600,000. Moreover, even if we recognized the reduced differential of $150,000, this is still a substantial figure for which there must be specific proof of availability. Indeed, Threadgill's testimony makes clear that the tightened loan arrangements made in 1990 reflect a "much more conservative . . . broadcast lending market" than in 1987. Salt City Exh. 8, p. 2; Exh. 10.

[7] In reaching this result, however, we place no reliance on *Roxanne Givens*, 5 FCC Rcd 5371 (Rev. Bd. 1990), as urged by D.J. for the proposition that other MESBICs would not have been able to assist MBIC. In that case, Syncom expressly withdrew a proposed financing letter to N. Walter Goins because a pre-existing involvement with a Goins interest and SBA overline investment limits restricted the amounts it could lend to any one investor at the same time. *Id.* at 5372. There is no evidence that a comparable problem exists here with Salt City.

In so holding, we also note that although the Commission has recognized the obstacles faced by minority applicants in obtaining financing, *see, e.g., Muncie Broadcasting Corp.*, 54 RR 2d 42, 47 (1983); *Washington's Christian*, 94 FCC 2d at 1365, nevertheless, the Commission has not adopted special financial qualifica-

tion standards for minority applicants, *see Bison City TV 49 Limited Partnership*, 91 FCC 2d 26, 30 n.5 (Rev. Bd. 1982), and neither party is suggesting that we do so here.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements for
Cost Support Material to be
Filed with Open Network
Architecture Access Tariffs

Petition for Reconsideration

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1992; Released: July 2, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On September 19, 1991, the Common Carrier Bureau (Bureau) released the *ONA TRP Order*.[1] This Order specified certain requirements for summary cost support material that the Bell Operating Companies (BOCs)[2] must file to support their Open Network Architecture (ONA) access charge tariff filings. [3] In October 1991, American Telephone and Telegraph Co. (AT&T) filed a petition for reconsideration of the *ONA TRP Order*.[4] This petition is unopposed. For reasons discussed below, we deny this petition.

II. DISCUSSION

2. In the *Part 69 ONA Order*, the Commission required the BOCs to unbundle their feature group offerings into basic service elements (BSEs) and basic serving arrangements (BSAs).[5] The Order also required that the initial unbundled BSE and BSA rates would generate revenue less than or equal to revenue from feature group rates then in existence.[6] In the *ONA TRP Order*, the Bureau developed a uniform format to compare revenue and demand characteristics before and after this change. This uniform format was called Chart NEUT-1, and the Bureau required BOCs to use this format to demonstrate the required revenue neutrality.[7] That Order also required the BOCs to determine which BSAs and BSEs provided the same features and functions that were available under the bundled feature group arrangements.[8] If the BOCs believed that some features and functions formerly offered in feature groups would not be purchased in comparable quantity when purchased separately as BSEs, the Order allowed the BOCs to reflect this in their recast historical demand used to compute a rate for that BSE.[9] However, carriers which did so were required to "provide the recast historical demand which gives full functional equivalence, list which BSEs and how many units of the BSEs will not be purchased, list which of their existing customers will not purchase the BSEs, and describe the method by which the company determined the BSEs that would not be purchased.[10]

3. AT&T maintains that using projected demand estimates to modify recast historical demand for particular BSEs is inconsistent with the *Part 69 ONA Order* and the Commission's price cap rules. AT&T contends that the Commission in the *AT&T Price Cap Order* decided not to rely on projected demand in calculating price cap indexes because of the difficulties in projecting demand accurately, and difficulties in reviewing and evaluating demand estimates.[11] AT&T also asserts that the Commission should not rely on the BOCs' demand projections in the ONA context, because underestimated demand would result in

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[1] Commission Requirements for Cost Support Materials To Be Filed with Open Network Architecture Access Tariffs, 6 FCC Rcd 5682 (Com.Car.Bur. 1991) (*ONA TRP Order*).

[2] The Bell Operating Companies are the Ameritech Operating Companies (Ameritech); the Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Telephone Companies (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell, Nevada Bell, Southwestern Bell Telephone Company (Southwestern Bell), and US West Communications, Inc. (US West).

[3] BOCs were required to file ONA tariffs on or before November 1, 1991. Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, CC Docket No. 89-79, Report and Order, Order on Reconsideration, and Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*).

[4] AT&T characterized its petition as a "petition for clarification or, in the alternative, reconsideration." Northern Telecom, Inc. (Northern Telecom) also filed a petition for reconsideration of the *ONA TRP Order*, but later withdrew that petition.

[5] In the *Computer III Order*, the Commission concluded that the provision of unbundled basic service "building blocks" would promote the ability of the BOCs' ESP competitors to compete effectively. Hence, the Commission ordered the BOCs to unbundle from their existing feature group access arrangements, labelling the optional and generally software-based features and functions as basic service elements (BSEs). These BSEs were distinguished from the underlying switching and transmission services called basic serving arrangements (BSAs). Amendments of Section 64.702 of the Commission's Rules and Regulations, Report and Order, CC Docket No. 85-229, 104 FCC 2d 958 (1986) (*Computer III Order*). *See also Part 69 ONA Order*, 6 FCC Rcd at 4526, para. 8.

[6] *Part 69 ONA Order*, 6 FCC Rcd at 4532, para. 48.

[7] Chart NEUT-1 displays the historical demand, rates, and revenue for the bundled feature groups. This chart also displays the historical demand recast into the BSAs and BSEs, the BSA and BSE rates, and the revenue computed from that data. Finally, the chart compares feature group revenue to the revenue computed from the BSA and BSE rates. *ONA TRP Order*, 6 FCC RCd at 5683, para. 10.

[8] In the *ONA TRP Order*, the Bureau referred to this group of BSEs as "functionally equivalent" to the feature groups. *Id.* at 5683, para. 11.

[9] *ONA TRP Order*, 6 FCC Rcd at 5683, paras. 10-11.

[10] *Id.*

[11] AT&T Petition at 5-8, *citing* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195, 3435, para. 445; Second Report and Order, 4 FCC Rcd 2873, 2912, para. 85 (1989) (*AT&T Price Cap Order*), *modified on recon.* 6 FCC Rcd 665 (1991), *appeal docketed*, AT&T v. FCC, No. 91-1178 (D.C. Cir. April 15, 1991).

higher than expected ONA rates. AT&T argues this would violate the Commission requirement of revenue neutrality.[12]

4. We find that the *ONA TRP Order* is consistent with both the *Part 69 ONA Order* and the price cap rules. The price cap rules give carriers flexibility to use different methods to recast historical demand, and specifically allow the use of estimation techniques.[13] The data requirements outlined in the *ONA TRP Order* were designed to give information required to assess the estimation techniques used by the BOCs in recasting their historical feature group demand. This recast demand was then used to demonstrate revenue neutrality as required by the *Part 69 ONA Order*. Therefore, we deny AT&T's petition on this issue.

III. ORDERING CLAUSES

5. Accordingly, IT IS ORDERED that the petition for clarification or reconsideration filed by American Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[12] *Id.* at 9.
[13] *See* Sections 61.46(c) and 61.47(d) of the Commission's Rules, 47 C.F.R. §§ 61.46(c), 61.47(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-136

In the Matter of

Amendment of Part 97 of the	RM-7849
Commission's Rules to Relax	RM-7895
Restrictions on the Scope of	RM-7896
Permissible Communications in	
the Amateur Service.	

NOTICE OF PROPOSED RULE MAKING

Adopted: June 18, 1992; Released: July 2, 1992

Comment Date: October 1, 1992
Reply Comment Date: December 1, 1992

By the Commission:

I. INTRODUCTION

1. In this *Notice of Proposed Rule Making (Notice)*, we propose to amend the rules for the amateur service by lessening restrictions on the scope of the permissible communications that amateur stations may transmit. This proceeding was initiated by two petitions and a letter requesting rule making relating to this issue.[1]

II. DISCUSSION

2. The petitioners generally seek greater flexibility for amateur stations to transmit communications for public service projects and personal matters. They want to eliminate rules that bar amateur stations from transmitting occasionally messages that could indirectly facilitate the business or commercial affairs of some party and messages that could be transmitted in other radio services. They ask, therefore, for amendment of Section 97.113 of the Commission's Rules, 47 C.F.R. § 97.113. The petitioners indicate this rule needs to be reviewed in light of contemporary communication demands and the operational capabilities of licensees in the amateur service. The petitioners argue that the prohibition against using the amateur service as an alternative to other authorized radio services, except as necessary for emergency communications, may unnecessarily restrict amateur operators from participating in many public service activities and from satisfying their personal communications requirements.

3. The current Section 97.113 is intended to help maintain the non-commercial character of the service by prohibiting certain types of transmissions by amateur stations.[2] We do not, however, want to inhibit amateur operators from using the service frequencies in the manner they believe best suited to their purposes. The objective of this proceeding, therefore, is to determine if the prohibitions in Section 97.113 should be relaxed, and, if so, how Section 97.113 should be revised to accommodate the uses of the service frequencies that amateur operators desire.

4. The League contends that restrictions on the content of amateur station transmissions should be based on the principle that any amateur-to-amateur communication is permitted unless specifically prohibited.[3] The League, therefore, seeks to allow amateur stations to transmit occasionally certain types of communications that are now prohibited so that the amateur service community can better meet public service communications needs.[4] The League states that its suggested amendment would not subject the service to exploitation because the self-regulating character of the service would provide the proper checks and balances.[5] It also argues that each licensee can best determine for himself or herself whether a particular public service project, such as providing communications at spectator events,[6] is a reasonable use of the amateur service frequencies.[7] The League also seeks to allow an amateur station control operator to accept compensation when using the station as part of classroom instruction at an educational institution.[8]

5. Reynolds and Ruh ask that amateur stations be authorized to fill communications voids in other radio services.[9] They suggest eliminating the prohibition on amateur stations retransmitting the broadcasts of stations in other radio services, such as government time and

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[1] Petitions were received from Michael R. Reynolds (RM-7849), and Henry B. Ruh on behalf of Amateur Television Quarterly Magazine (RM-7896). The letter was received from the American Radio Relay League, Inc. (League). Because of the detail it contains, it is treated as a petition (RM-7895).

[2] Section 97.113 prohibits amateur stations from transmitting any communications the purpose of which is to facilitate the business or commercial affairs of any party. It prohibits amateur stations from transmitting communications as an alternative to other authorized radio services. It also prohibits the transmission of music; communications in connection with any activity that is contrary to law; encrypted messages; words, language or meaning that is obscene, indecent, or profane; and false or deceptive messages or signals. This rule provides, however, exceptions for providing emergency communications, facilitating the public's safe observation of public gatherings, selling amateur station apparatus, and conveying news information.

[3] RM-7895 at 2.

[4] *Id.* at 1.

[5] *Id.* at 11.

[6] *Id.* at 10.

[7] *Id.* at 10-11. The League's proposed revision is based upon the principles that (a) amateur operators should not conduct communications in exchange for compensation or for the benefit of their employers, (b) amateur operators should not transmit communications in which the operator has a pecuniary interest, and (c) amateur operators should not use amateur service frequencies regularly as a substitute for other licensed radio services. The yardstick the amateur operators would use for determining pecuniary interest would be the business implication of the licensee initiating the communication, not the recipient.

[8] *Id.* (Attachment) at 1.

[9] RM-7849 at 3 and RM-7896 at 1.

weather stations.[10] They also request that amateur stations be allowed to retransmit music included in space shuttle communications.[11] Ruh further requests that amateur stations be allowed to retransmit video obtained from government and private radar stations.[12]

6. Periodicals serving the amateur service community have indicated that there is already widespread use of amateur service frequencies by amateur operators to bolster governmental functions. These periodicals routinely commend and laud amateur operators for providing communications for police and fire departments,[13] and for reporting data to the National Weather Service.[14] Correspondence from amateur operators also suggests that they want to communicate messages relating to their personal, business such as ordering goods and services.[15] Some commenters, however, oppose any change to Section 97.113. One group states that to relax the prohibited transmission rule would undermine the basic principle of noncommercial communications upon which the amateur service is founded and for which the frequencies are allocated.[16] Other commenters express the view that allowing any business-related communications on amateur service frequencies would be disruptive[17] and that any relaxation of the prohibited communication rule would mark the end of the amateur service.[18]

III. PROPOSAL

7. It appears clear from the petitions and comments discussed above that much of the amateur community strongly supports relaxing a number of the existing restrictions on the scope of amateur services communications. Further, it appears that the amateur community appreciates both the benefits and the burdens of relaxing these existing restrictions. The restrictions on permissible communications in the rules were designed to protect the essential character of the amateur service as a reservoir of volunteer communicators, technicians and electronics experts dedicated to advancing the radio art, to provide public service communications particularly in times of emergencies, and to enhance international goodwill. While eliminating some of the existing restrictions would provide the flexibility to expand public service activities and satisfy the personal communications interests, the potential for commercial exploitation and abuse of the amateur service's allocated frequencies could increase.

8. After careful consideration, we propose to relax the restrictions on the scope of permissible amateur communication. Specifically, we propose the revision suggested by the League. Our decision is based on the following factors. First, the League's suggested proposal appears to best consolidate the views of the amateur community. Second, relaxing the restriction on permissible communications would permit the amateur community to increase its public service activities. Third, as noted by the League, the amateur community has a long tradition of self-regulation and a strong commitment to maintaining the unclouded distinction between the amateur service and other radio services.

9. The proposed rule amendments would expand the scope of public service communications and personal communications permitted in the amateur service. More specifically, we propose to relax the prohibition against amateur stations transmitting any communications that could be furnished via other radio services. Our intent is to allow amateur operators who so desire to increase their public service activities in support of parades, races, and other public gatherings. We also propose to remove the outright bar on amateur stations transmitting communications that could facilitate the business affairs of any party. This change would allow amateur stations to transmit, for example, communications relating to amateur radio club business activities. Amateur stations could also transmit communications, such as ordering food, lodging, and transportation, that incidentally facilitated the commercial activities of some party. We further propose to permit control operators to accept compensation as an incident of a teaching position during periods of time when the station is used for classroom instruction. The general prohibition against amateur operators transmitting messages for hire or for material compensation, direct or indirect, however, would remain in the rules.

10. These proposals are not intended to alter in any way the nature and purpose of the amateur service. Rather, they are intended to give amateur operators more flexibility to serve the public as well as to enhance their personal communication capabilities. These proposed changes, however, also would increase the amateur community's responsibilities for selfregulation and cooperation in the use of their allocated frequencies. We request comments, therefore, on the proposed amendments to the Amateur Radio Services Rules set forth in the attached Appendix. We are not proposing to allow amateur stations to transmit music as suggested by Ruh. We believe this proposal could alter the nature and purpose of the service and is well beyond our goal of providing greater flexibility for amateur stations to transmit communications for public service gatherings and personal matters. Interested parties, however, may comment regarding whether transmission of music should be allowed.

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[10] RM-7849 at 1, 3, and RM-7896 at 2. The League also proposes eliminating this prohibition. *See* RM-7895 at 14.

[11] RM-7849 at 2, RM-7896 at 2.

[12] RM-7896 at 1-2.

[13] *See* The National Amateur Radio Association's *The Amateur Radio Communicator*, October, 1991, 18-20; comment of Gay James at 3, *Worldradio* January, 1992, 1, 3; *QST* February, 1992, 23; *QST* May, 1991, 14.

[14] *See* The National Amateur Radio Association's *The Amateur Radio Communicator*, November, 1991, 22-24, *Worldradio*, March, 1992, 26-27, *QST*, July, 1991, 69.

[15] Letter from Mr. C. Murray Robinson to Chief, Personal Radio Branch (September 10, 1991).

[16] Comment of Hood County Amateur Radio Club at 2.

[17] Comment of A. Prose Walker at 1, Comments of American Amateur Radio Council (AARC) at 5. The late filed AARC Comments were accompanied by a request for acceptance. We have accepted and considered AARC's Comments in the interest of developing as complete a record as possible on this issue.

[18] Comment of Steve Lund at 1, Jon Book at 1, Southeast Louisiana Amateur Radio Club at 1.

IV. PROCEDURAL MATTERS

Ex Parte Rules - Non-Restricted Proceeding

11. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. §§ 1.1202, 1.1203, and 1.1206(a).

Regulatory Flexibility Act

12. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because, if the proposed rule amendments are promulgated, there will not be any significant economic impact on small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. The amateur service may not be used to transmit business communications on a regular basis. *See* 47 C.F.R. § 97.113(a). The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 605(b) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. §§ 601-612 (1981).

Comment Dates

13. Pursuant to applicable procedures set forth in §§ 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before **October 1, 1992,** and reply comments on or before **December 1, 1992.** To file formally in this proceeding, you must file an original and five copies of all comments, and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. To file informally, you must file an original and one copy of your comments, provided only that the Docket Number is specified in the heading. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

14. For further information, contact William T. Cross, Personal Radio Branch, Private Radio Bureau, (202) 632-4964.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

Part 97 of Chapter I of Title 47 of the Code of Federal Regulations is proposed to be amended as follows:

1. The authority citation for Part 97 would continue to read as follows:

Authority citation: 48 Stat. 1066, 1082, as amended; 47 U.S.C. §§ 154, 303. Interpret or apply 48 Stat. 1064-1068, 1081-1105, as amended; 47 U.S.C. §§ 151-155, 301, 609, unless otherwise noted.

2. Section 97.113 would be revised to read as follows:

§ 97.113 Prohibited transmissions.

(a) No amateur station shall transmit:

(1) Communications for hire or for material compensation, direct or indirect, paid or promised, except as otherwise provided in these rules;

(2) Communications in which the station licensee or control operator have a pecuniary interest, including communications on behalf of an employer. Amateur operators may, however, notify other amateurs of the availability for sale or trade, of apparatus normally used in an amateur station, provided that such activity is not conducted on a regular basis;

(3) Music; Communications intended to facilitate a criminal act; Messages in codes or ciphers intended to obscure the meaning thereof, except as otherwise provided herein; Obscene, indecent, or profane words or language; or false or deceptive messages, signals or identification;

(4) Communications, on a regular basis, which could reasonably be furnished alternatively through other radio services.

(b) An amateur station shall not engage in any form of broadcasting, nor may an amateur station transmit one-way communications except as specifically provided in these rules; nor shall an amateur station engage in any activity related to program production or newsgathering for broadcasting purposes, except that communications directly related to the immediate safety of human life or the protection of property may be provided by amateur stations to broadcasters for dissemination to the public where no other means of communication is reasonably available before or at the time of the event.

(c) A control operator may accept compensation as an incident of a teaching position during periods of time when an amateur station is used by that teacher as a part of classroom instruction at an educational institution.

(d) The control operator of a club station may accept compensation for the periods of time when the station is transmitting telegraphy practice or information bulletins, provided that the station transmits such telegraphy practice and bulletins for at least 40 hours per week; schedules operations on at least six amateur service MF and HF bands using reasonable measures to maximize coverage; where the schedule of normal operating times and frequencies is published at least 30 days in advance of the actual transmissions; and where the control operator does not accept any direct or indirect compensation for any other service as a control operator.

(e) No station shall retransmit programs or signals emanating from any type of radio station other than an amateur station, except propagation and weather forecast information originating from United States

Government stations, and communications originating on United States Government frequencies between a space shuttle and its associated Earth stations. Prior approval for such retransmissions must be obtained from the National Aeronautics and Space Administration. Such retransmissions must be for the exclusive use of amateur operators. Propagation, weather forecasts, and shuttle retransmissions may not be conducted on a regular basis, but only occasionally, as an incident of normal amateur radio communications.

(f) No amateur station, except in auxiliary, repeater or space operation, may automatically retransmit the radio signals of other amateur stations.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: June 19, 1992; Released: June 19, 1992

By the Commission:

I. INTRODUCTION

1. The Virgin Islands Telephone Corporation (Vitelco) has requested that the Commission stay our requirement that Vitelco issue, and report on, refunds of access charges ordered in the above-referenced investigation pending its appeal of that requirement before the United States Court of Appeals for the District of Columbia Circuit. In this order we grant Vitelco's stay request, subject to the terms in this order.

II. BACKGROUND

2. On December 15, 1989, Vitelco filed increases in access charge rates for the balance of the 1989-90 access period. Vitelco asserted that those increased rates were justified to enable Vitelco to realize its authorized rate of return during the balance of the access period. Vitelco said that the existing rates would not produce sufficient earnings during the balance of the access period because the damage to Vitelco's plant caused by Hurricane Hugo in September 1989 would depress demand during that period.

3. Although access charges for rate of return carriers are normally recomputed annually to produce the authorized rate of return for the annual access charge period, a carrier may file a midcourse correction during the access year if the carrier has reason to believe that the original rate of return projection will not be accurate. Vitelco was not able to provide all of the data that the Common Carrier Bureau normally requires to support such a midcourse correction. The carrier did not provide any estimate of the effect of Hurricane Hugo on projected expenses for the balance of the access year. Thus, its tariff filing could have been rejected.

4. In view of the emergency created by Hurricane Hugo, the uncertainty regarding future short-term demand in the wake of the hurricane, as well as the apparent possibility that Vitelco's revenues and profits would be severely depressed while it developed additional cost support data, which in turn could prevent Vitelco from providing adequate service to customers, the Bureau chose to exercise discretion in these unusual circumstances not to reject the tariff. Instead, in an effort to accomodate Vitelco's unusual circumstances and ameliorate these potential problems, the Bureau waived some of the Part 61 cost support requirements and granted Vitelco special permission to make the rate increases effective upon January 1, 1990, instead of requiring the maximum 90 day statutory notice. Having granted those waivers and special permission to avoid rejection, the Bureau then initiated an investigation pursuant to Section 204(a) of the Communications Act, 47 U.S.C. § 204(a), to determine whether the increased rates would be just and reasonable.[1] The Bureau suspended the rate increases for one day and imposed an accounting order. The rates became effective on January 2, 1990 and remained in effect through June 30, 1990. The increased rates were superseded by rates for the 1990-91 access period on July 1, 1990.

5. In the meantime Vitelco filed its direct case on April 6, 1990, in response to the Bureau's direction that Vitelco demonstrate that the rate increases were not excessive. Vitelco subsequently supplemented the direct case with actual results for the first three months of 1990. The actual data indicated that Vitelco earned a 35 percent return on switched traffic sensitive elements and a 32 percent return on special access during that three month period. At the time the Commission had prescribed a rate of return of 12 percent for interstate access services. Vitelco submitted a further direct case on December 21, 1990, but it did not submit data on actual results for the remaining three months that these rates were in effect.

6. On December 16, 1991, this Commission released an order concluding the investigation of the January-June 1990 Vitelco rates. That order noted that Section 204(a)(1) of the Communications Act provided in pertinent part that "[a]t any hearing involving a charge increased, or sought to be increased, the burden of proof to show that the increased charge, or proposed charge, is just and reasonable shall be on the carrier. ..." We concluded that Vitelco failed to meet that burden. Our order stated: "The rate increases were not required to enable Vitelco to earn its authorized return during the January-June 1990 period. The prior rates would have produced a return that equaled or exceeded the authorized return. Therefore, the increased rates are unjust and unreasonable."[2] We directed Vitelco to refund to customers who paid Vitelco access charges during the January 2 - June 30, 1990 period "all

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[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 5 FCC Rcd 112 (Com.Car.Bur. 1989). Midcourse correction access tariffs usually do not provoke Section 204 investigations. The Bureau decided to initiate the investigation of the Vitelco midcourse because the Bureau had substantial doubts with respect to the accuracy of Vitelco's projections at the time those projections were made.

[2] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Memorandum Opinion and Order, 6 FCC Rcd 7350, 7351 (1991) (*December 16 Order*).

amounts charged by Vitelco in excess of revenue that would have been produced by its prior interstate traffic sensitive switched and special access rates, plus interest."

7. On January 3, 1992, Vitelco filed a motion to stay the refund requirement pending reconsideration and/or judicial review of our order.[3] Vitelco claims that a stay is justified under the four-prong test this Commission has generally used to determine whether a Commission order should be stayed pending reconsideration or judicial review. Vitelco subsequently filed an untimely petition for reconsideration, which we are dismissing.[4] Vitelco did file a timely petition for review in the Court of Appeals for the District of Columbia Circuit.[5]

8. The motion for stay states that Vitelco is likely to prevail on the merits of its arguments, that Vitelco will suffer irreparable harm if it completes the refunds and the Commission order is subsequently reversed, that a stay pending review will not injure the public or potential refund recipients and that a stay will serve the public interest. The motion describes two arguments that Vitelco expects to present to the Court. First, Vitelco contends that this Commission does not have the authority to order a Section 204 refund that is "based solely on categorical earnings for a six month period."[6] Vitelco contends that our conclusion that Section 204 authorizes this refund conflicts with the decision of the Court of Appeals for the Sixth Circuit in *Ohio Bell Telephone Company v. FCC*.[7]

9. Vitelco also contends that our decision to order a Section 204 refund in this case is inconsistent with prior Commission decisions to dismiss Section 208 complaints that the complainants based upon overearnings for periods of less than two years. Vitelco characterizes our refund decision as a departure from this Commission's "established practice" and asserts that failure to explain this departure is "arbitrary and capricious".[8]

10. AT&T filed its opposition to Vitelco's motion for stay on January 10, 1992. It charges that Vitelco violated Section 1.211 of the Commission's Rules, 47 C.F.R. § 1.211, which requires that "all pleadings filed in a hearing proceeding shall be served upon all other counsel in the proceeding...."[9] AT&T also asserts that the Vitelco motion does not meet the Commission's standard for grant of a stay.[10]

11. On January 21, 1992, in a permissible *ex parte* filing,"[11] Vitelco argued that the investigation was conducted as a nonrestricted notice and comment rulemaking proceeding. According to Vitelco, service requirements do not attach to a motion for stay filed in a tariff investigation which is conducted as a notice and comment proceeding.

III. DISCUSSION

12. As a threshold matter, AT&T is mistaken in its contention that it should have been served a copy of Vitelco's stay motion. The Vitelco investigation was designated as a nonrestricted notice and comment rulemaking proceeding.[12] The section of the Commission's Rules which governs rulemaking proceedings contains no requirement that motions for stay be served on parties to the proceeding.[13] Therefore, Vitelco was not required to serve AT&T a copy of its motion for stay.

13. We turn now to the merits of the Vitelco stay request. It appears that Vitelco has not met the requirements for a stay, particularly regarding irreparable injury, under the *Virginia Petroleum Jobbers* line of cases which we have applied in other contexts.[14] Nevertheless, we are exercising our equitable discretion (*see, e.g.*, 5 U.S.C. § 705) to stay the refund and reporting requirements, conditioned on Vitelco filing with the Commission within 14 days of the release of this Order proof that the amounts owed as a result of the decision have been deposited in an

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[3] Vitelco also requested a stay of the requirement that it file a report that would "identify the recipients of refunds, the method of payment, and Vitelco's documented narrative explaining its use of actual billings in determining the recipients, amounts, and payment method."

[4] *See* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, FCC 92-265, released June 19, 1992. In this regard, we reject Vitelco's suggestion that we treat its stay request as a timely filed petition for reconsideration.

[5] Virgin Islands Telephone Co. v. FCC, No. 92-1063, (D.C. Cir.), filed February 12, 1992.

[6] We note that the refund we ordered was not based upon the amount of overearnings for the January - June 1990 period or any other period. Our order directed Vitelco to refund the difference between revenues produced by the unjustified increased rates and revenues that would have been produced by the prior rates. Evidence in the record indicates that the prior rates would have produced earnings during the January - June 1990 period that would have exceeded the prescribed rate of return. Thus, a refund based upon January June overearnings would probably have been larger than the refund we ordered.

[7] Ohio Bell Telephone Co. v. FCC, 949 F.2d 864 (6th Cir. 1991). The *Ohio Bell* decision was issued 16 days after this Commission adopted the final order in this proceeding.

[8] We note, however, that Vitelco originally claimed that it required the rate increase to prevent possible underearnings only during the six-month period of January through June of 1990. Vitelco presented no alternative theories to meet its burden to demonstrate that this increased charge was just and reasonable. Also, as noted above, see n.6, *supra*, the refund here was not based on overearnings.

[9] AT&T Opposition at 3.

[10] AT&T argues that Vitelco demonstrates no likelihood of success on the merits because the Commission previously considered and rejected Vitelco's argument that the 1989-90 monitoring period was more appropriate than the investigation's six-month period. AT&T next contends that Vitelco's assertion that it would be difficult, if not impossible, to recover the refunded amounts should it ultimately prevail, did not constitute irreparable injury. As to the criteria that a stay would serve the public interest and cause no harm to other parties, AT&T argues that granting a stay of the *December 16 Order* would not further the public interest because Vitelco does not demonstrate any infirmity in that order, and delay in effecting restitution to Vitelco's customers is undesirable.

[11] Vitelco's response was made in an *ex parte* presentation to representatives from the Common Carrier Bureau and Office of General Counsel. Written documentation of that presentation was also filed with the Secretary, Federal Communications Commisison, on January 21, 1992.

[12] Virgin Islands Telephone Corporation, CC Docket No. 90-124, 5 FCC Rcd 1622, *modified*, 5 FCC Rcd 2525 (Com.Car.Bur. 1990).

[13] *See* Sections 1.399 - 1.429 of the Commission's Rules, 47 C.F.R. §§ 1.399 - 1.429 (Subpart C - Rulemaking Proceedings).

[14] *See* Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); Virginia Petroleum Job. Ass'n v. Federal Power Com'n, 259 F.2d 921 (D.C. Cir. 1958) (*Virginia Petroleum Jobbers*).

interest bearing escrow account.[15] This approach will protect the rights of all parties, will not harm AT&T or its customers, and will eliminate the possibility of "irretrievable financial losses" to shareholders and ratepayers.[16]

IV. CONCLUSION

14. Accordingly, we grant Vitelco's application for stay of the refund and reporting requirements in the *December 16 Order*, subject to Vitelco's filing proof of an interest-bearing escrow account in the amount of the refund. We grant Vitelco 14 days to comply with the terms of this Order.

V. ORDERING CLAUSE

15. ACCORDINGLY, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, 47 U.S.C. § 154(i), that the motion filed by the Virgin Islands Telephone Corporation to stay the refund and reporting requirements in the above-captioned proceeding IS GRANTED to the extent indicated herin. Grant of this stay is contingent upon Vitelco's filing proof of an interest-bearing escrow account in the amount of the refund "within 14 days of the release of this Order. Interest shall accrue at the prevailing IRS rate.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[15] Because we are not using the standard in *Virginia Petroleum Jobbers* to grant Vitelco's stay request, AT&T's arguments concerning that standard need not be addressed. Our use of a different standard to stay this refund order does not mean that applicants for a stay of other kinds of FCC decisions are relieved of the burden of showing irreparable harm.

[16] *See, e.g.*, Communications Satellite Corporation, CC Docket Nos. 80-634 and 85-268, Memorandum Opinion and Order, 3 FCC Rcd 2643 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-124

In the Matter of

Virgin Islands Telephone Corporation — Transmittal No. 6

Tariff F.C.C. No. 1

Switched and Special Access Rate Adjustments

ORDER

Adopted: June 19, 1992; Released: June 19, 1992

By the Commission:

1. In an Order adopted November 5, 1991, the Commission found that the traffic sensitive switched access and special access rates charged by the Virgin Islands Telephone Corporation (Vitelco) between January 2, 1990 and June 30, 1990 were unlawful to the extent those rates exceeded rates in effect prior to January 2, 1990. The Commission therefore ordered Vitelco to issue refunds with interest within 60 days of the release of the *December 16 Order*.[1] The Commission also directed Vitelco to file a report describing Vitelco's efforts to effectuate these refunds within 30 days of the release of that Order.

2. On January 3, 1992, Vitelco filed a motion to stay the refund obligations imposed upon it by the *December 16 Order*.[2] On January 16, Vitelco filed a petition for reconsideration of the *December 16 Order*, one day past the deadline for submitting such petitions. Vitelco filed with its petition for reconsideration a motion for leave to file the petition for reconsideration one day late. Vitelco states the late filing was due to miscommunication within its counsel's law firm. In its motion, Vitelco asserts that Section 405 of the Communications Act, 47 U.S.C. § 405, does not bar the Commission from granting a late-filed petition.[3] On January 23, 1992, AT&T filed its opposition to Vitelco's motion, arguing that the Commission may not extend or waive the statutory filing period in the absence of "extraordinary circumstances." On January 31, 1992, Vitelco filed a reply which reiterated the arguments it presented earlier.

3. Petitions for reconsideration of the *December 16 Order* were due on or before January 15, 1992. As Vitelco acknowledges, its petition for reconsideration filed on January 16, 1992 was not timely. As we have noted previously, in the absence of a Commission failure to provide notice of its decision to parties as required by its rules, we lack authority to extend or waive the statutory 30-day filing period specified in Section 405.[4] Vitelco's motion for leave to file its petition for reconsideration is therefore denied, and its petition for reconsideration is therefore dismissed.

4. Accordingly, IT IS ORDERED that the petition for reconsideration of the *December 16 Order*, filed by the Virgin Islands Telephone Corporation, IS DISMISSED.

5. IT IS FURTHER ORDERED that the motion for leave to file the petition for reconsideration one day late, filed by the Virgin Islands Telephone Corporation, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

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[1] Virgin Islands Telephone Corporation, CC Docket No. 90-124, Memorandum Opinion and Order, 6 FCC Rcd 7350 (1991) (*December 16 Order*).

[2] The Common Carrier Bureau has extended the deadline for both the refund and the reporting requirements in order to provide further time to consider Vitelco's stay request. That deadline is now June 19, 1992. *See* VirginIslands Telephone Corporation, CC Docket No. 90-124, Order, DA 92-636, released May 21, 1992; *see also* Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 2609 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 2166 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 1444 (Com.Car.Bur. 1992); Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, 7 FCC Rcd 711 (Com.Car.Bur. 1992). By separate order, we are granting Vitelco's stay motion. Virgin Islands Telephone Corporation, CC Docket No. 90-124, Order, FCC 92-264, released June 19, 1992.

[3] Section 405 of the Communications Act, 47 U.S.C. § 405, provides that a petition for reconsideration "must be filed within thirty days from the date upon which public notice is given of the order, decision, report, or action complained of." *See also*, Section 1.429(d) of the Commission's Rules, 47 C.F.R. § 1.429(d).

[4] *See* Mary R. Kupris, 5 FCC Rcd 5142, para. 2 (1990) (*citing* Reuters Ltd. v. FCC, 781 F.2d 946,951-52 (D.C. Cir. 1986); Gardner v. FCC, 530 F.2d 1086 (D.C. Cir. 1976); Richardson Independent School District, 5 FCC Rcd 3135 (1990)), *vacated and remanded on other grounds sub nom.* WLOS TV, Inc. v. FCC, 932 F.2d 993 (D.C. Cir. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-401

In re Applications of

OLIVER KELLEY AND MARY ANN KELLEY Joint Tenants with the Right of Survivorship	File No. BPH-870821MB
VAL-JO COMMUNICATIONS, INC.	File No. BPH-870827MD
MARTHA JEAN SULLIVAN	File No. BPH-870827MN

For Construction Permit for a New FM Station on Channel 297A, Nolanville, Texas

ORDER

Adopted: June 24, 1992; Released: July 2, 1992

By the Commission:

1. Before the Commission are an Application for Review filed January 15, 1992, by Martha Jean Sullivan (Sullivan), and an Opposition filed January 30, 1992, by Val-Jo Communications, Inc. (Val-Jo). These pleadings relate to a Review Board decision, *Oliver Kelley and Mary Ann Kelley*, 6 FCC Rcd 7377 (1991), granting the construction permit application of Val-Jo for a new FM station in Nolanville, Texas, and denying the mutually exclusive applications of Sullivan and Oliver Kelley and Mary Ann Kelley.[1] Having thoroughly reviewed the above pleadings, the record, and the Board's decision, we find that the matters raised in Sullivan's application for review were properly considered by the Board, and, thus, we agree with the Board's disposition of this case. However, brief comment is warranted.

2. To the extent that Sullivan contends the Board erred in failing to consider her interrogatory answers given during discovery, which she claims demonstrate that she has resided within the service area of her proposed station since 1980, we find no merit to that contention. *See* Answers to Interrogatories filed May 5 and June 7, 1989. As the Board correctly recognized, those matters were not proffered during the hearing or tested by the crucible of cross-examination and therefore are not a part of the evidence in this case. In this regard, *Posey County Broadcasting Corp.*, 5 FCC Rcd 5745, 5746 ¶ 11 (1990), aff'd sub nom *Southern Indiana Broadcasting, Ltd.*, 935 F.2d 1340, 1342 (D.C. Cir. 1991), where consideration was given to a prehearing deposition to determine whether it sustained allegations seeking further evidentiary hearings, provides no support for Sullivan's claim that its untested prehearing answers to interrogatories are sufficient to carry its burden of proof during the evidentiary hearing. Under these circumstances, we believe the Board properly excluded those answers from its consideration of Sullivan's claimed long-term service area residence.

3. ACCORDINGLY, IT IS ORDERED pursuant to 47 C.F.R. § 1.115(g) that the Application for Review filed January 15, 1992, by Martha Jean Sullivan IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The Kelleys did not file an application for review of the Board's decision and thus its denial of their application is final.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Application of

Haddonfield Wireless Company — File No. 5313-CM-P-83

For Authority to Construct and Operate a Multichannel Multipoint Distribution Service Station on E-group channels at Phoenix, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1992; Released: July 2, 1992

By the Chief, Domestic Facilities Division:

1. *Introduction.* The above-referenced application of Haddonfield Wireless Company (Haddonfield) to construct and operate a Multichannel Multipoint Distribution Service (MMDS) station on the E-group channels to serve the Phoenix, Arizona area was selected for qualification review as the result of a Commission lottery. Haddonfield filed a post-lottery amendment proposing to change its transmitter location. Arizona State University (University), an Instructional Television Fixed Service (ITFS) licensee, filed an opposition to the grant of Haddonfield's application, as amended. Haddonfield filed a response.

2. *Pleadings.* University asserts that Haddonfield must demonstrate *prior* to grant of its MMDS application a lack of harmful interference to the University's grandfathered ITFS station, pursuant to 47 C.F.R. Sec. 21.902(i).

> It is abundantly clear that the Haddonfield facility as currently proposed cannot be granted under Section 21.902(i) of the rules.
>
> [The University] has, however, anticipated the difficulty posed to MMDS operators in Phoenix by its ITFS system and expansion plans, and has filed with the Commission a proposal for a comprehensive system modification which would clear the way for MMDS operations... [This would lead[...] ultimately to the dismissal of its pending "F" channel application and surrender of the license for its "E" channel Station WHF-227.

University's Comments at 3. In its response, Haddonfield states:

> Haddonfield agrees with [the University] that colocation...would be in the interests of all parties if the Commission acts favorably on [the University's]...application and amendment...and modifications....These applications by [the University] would effectively resolve the interference problems that would exist.... [The University] will surrender its license for the E Channel Station upon Commission approval of its ITFS applications. At that time the question of cochannel interference will become moot.

Haddonfield's Response at 2-3.

3. *Discussion.* At the time the Haddonfield MMDS application was filed, Section 21.902(i) imposed a duty on MMDS applicants to protect grandfathered E and F channel ITFS station licensees from harmful interference.[1] On October 11, 1990, the Commission eliminated Section 21.902(i). Commission rules now require that an MMDS applicant file ITFS interference analyses *after* the MMDS application is granted." MDS applicants for the E and F channels filing before October 11, 1990, must file the specified ITFS interference analysis and notification *after* a conditional license is granted, but before construction commences."[2] The application of Haddonfield was filed prior to October 11, 1990. Thus, it is required to file an ITFS interference analysis *after* grant of its MMDS application, and prior to commencement of construction. Haddonfield's application has not yet been granted. Consequently, the University's argument is premature.[3]

4. *Ordering Clause.* Accordingly, IT IS ORDERED that the opposition filed by Arizona State University concerning the MMDS application of Haddonfield Wireless Company at Phoenix, Arizona IS HEREBY DENIED. This order is issued pursuant to 47 C.F.R. Sec. 0.291, and is effective on its release date. Petitions for reconsideration pursuant to 47 C.F.R. Sec. 1.106, or applications for review pursuant to 47 C.F.R. Sec. 1.115, may be filed within thirty (30) days of the date of public notice of this order. *See* 47 C.F.R. 24Sec. 1.4(b).

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[1] At that time, 47 C.F.R. Sec. 21.902(i) stated as follows:

> All [MMDS] applicants... must, prior to receiving a construction [authorization] and at such time as the Commission requests, file with the Commission an analysis demonstrating that the facility to be constructed will not cause harmful interference to existing cochannel or adjacent channel Instructional Television Fixed Service receiver locations within 50 miles of the transmitter, or in the alternative, submit a statement from the ITFS licensee that the interference is acceptable.

[2] *Report and Order, Amendment of Parts 21, 43, 74, 78 and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands*, 5 FCC Rcd 6410 n. 16 (1990)(hereinafter cited as *Wireless Cable Order)* (emphasis added); *see also Order on Reconsideration, id.*, 6 FCC Rcd 6764 (1991)(hereinafter cited as *Wireless Cable Reconsideration Order); Second Report and Order, id.*, 6 FCC Rcd 6792 (1991)(hereinafter cited as *Second Wireless Cable Order).*

[3] However, we remind Haddonfield that if its application is granted, it must file the ITFS interference analyses *prior to commencement of construction, or* it must file a consent statement from an ITFS licensee or construction permittee. *Id.; see also Second Wireless Cable Order*, 6 FCC Rcd at 6792; *Wireless Cable Reconsideration Order*, 6 FCC Rcd at 6771-73.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

THOMAS J. FLATLEY
(Assignor)

and File No. BALCT-911125KO

NEW ENGLAND TELEVISION
(Assignee)

For Assignment of License of
Television Station WNHT,
Concord, New Hampshire

MEMORANDUM OPINION AND ORDER

Adopted: June 23, 1992; Released: July 2, 1992

By the Commission:

1. The Commission has before it for consideration the unopposed application for assignment of the license of television station WNHT, Channel 21 (Ind.), Concord, New Hampshire, from Thomas J. Flatley to New England Television (NET). The president, director and sole shareholder of the proposed assignee, NET, is Wilson Hickam, who is also the president, a director and a 20 percent shareholder of Kennebec Valley Television, Inc. (Kennebec), permittee of unbuilt television station WWLA, Channel 35 (Ind.), Lewiston, Maine. Because the Grade B contour of station WNHT overlaps with that of television station WWLA, NET has requested a waiver of Section 73.3555(a)(3) of the Commission's Rules (the contour-overlap rule), which generally proscribes common ownership of two television stations whose Grade B contours overlap.

BACKGROUND

2. In support of NET's waiver request, Flatley has provided a financial history of WNHT, spanning the years since he acquired the station in December 1984. Flatley states that when he purchased WNHT it had been operated as an independent station and had been losing more than $100,000 per month. Over the next three years, according to Flatley, he invested approximately $900,000 in new equipment, a program library, and promotion of the station. Despite a steady increase in gross revenues during this period, the station lost an average of nearly $1.5 million each year. Flatley asserts that WNHT, still operating as an independent station, was unable to compete for national advertising accounts because of its location within the Boston area of dominant influence (ADI), the sixth largest television market. New Hampshire has no ADI of its own.

3. By late 1987, Flatley states, he hired a consulting firm, which recommended network affiliation as the route to profitability. In 1988, WNHT became a CBS affiliate, spending one million dollars on equipment and the hiring of 30 additional employees in order to upgrade the station pursuant to the affiliation agreement. The expansion of local programming, from two weekday newscasts to three plus a weekend newscast, contributed to the station's growing expenses. In 1988, Flatley states, WNHT lost three million dollars, leading to personnel layoffs the following year. Because the station continued to lose more than $200,000 per month, Flatley discontinued operation of the station on March 31, 1989. The station remains dark today, according to Flatley, despite his attempts, including the employment of a financial consultant, to find investors.

4. Notwithstanding WNHT's financial difficulties, Flatley notes that he was able to find a potential buyer for the station, Rogue Television Corporation Too, which entered into a purchase agreement with Flatley on May 18, 1990. Although the Commission granted its consent to the assignment, the sale was never consummated.[1] Upon termination of that agreement in August 1991, Flatley indicates that he immediately hired a broker, MassComm Image Concepts, Inc., to find a suitable buyer for station WNHT. MassComm notes that it made presentations to nine potential purchasers and investors in addition to NET. According to Flatley, NET was the only prospective buyer to make an offer. On October 24, 1991, NET entered into a purchase agreement with Flatley, and now proposes to return WNHT to operation upon our waiver of the contour-overlap rule and our consent to the assignment.

5. With regard to the overlap, NET contends that the Grade B contour overlap area between WNHT and WWLA is *de minimis*. The engineering study submitted by NET shows that the predicted Grade B contour of WNHT encompasses 19,355 square kilometers and 2,022,722 persons, while the Grade B contour of WWLA encompasses 9,442 square kilometers and 482,723 persons. The overlap area would encompass 188 square kilometers and 5,498 persons, representing. 99 percent of WNHT's Grade B contour area and. 27 percent of its population, and 2 percent of WWLA's Grade B contour area and 1.13 percent of its population. NET further alleges that the overlap area is well served. The engineering study states that four commercial television stations, representing all of the television stations in the Portland-Poland Spring ADI, and two educational television stations serve the overlap

[1] Rogue Television Corporation Too (Rogue) filed, on January 3, 1992, but later requested to withdraw, a petition to deny the assignment application. This request stemmed from a settlement agreement between Rogue and Flatley, which the staff approved pursuant to the Commission's policy regarding abuse of process. *See Abuse of the Commission's Processes*, 5 F.C.C. Rcd 3911, 3912 (1990). The petition to deny was dismissed on March 12, 1992. Nevertheless, once a petition to deny is filed, we are obligated to consider its merits, regardless of the fact that it is subsequently dismissed. *Booth American Company*, 58 F.C.C. 2d

area.[2] NET therefore concludes that the proposed combination will have minimal impact on diversity in the overlap area.

WAIVER REQUEST

6. The ultimate objectives of the Commission's contour-overlap rule, Section 73.3555(a)(3), as well as the other multiple ownership rules, are promotion of economic competition among stations and diversity of programming sources and viewpoints. *Multiple Ownership Rules*, 22 F.C.C. 2d 306, 307 (1970), *recon. granted in part*, 28 F.C.C. 2d 662 (1971). In adopting the contour-overlap rule, the Commission did not abandon all "flexibility"; it retained the power to waive the rule in cases where its application would be "inappropriate." *Multiple Ownership of Standard, FM and Television Broadcast Stations*, 2 R.R. 2d 1588, 1594 n. 12 (1964). The Commission has granted such a waiver in cases where signal overlap is *de minimis* and where no undue concentration of control of the media will result in a manner contrary to the public interest, *see, e.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd 7374 (1987), or, alternatively, where the applicant demonstrates that waiving the rule would result in the potential improvement of service to underserved areas, *Capital Cities Communications, Inc.*, 59 R.R. 2d 451,464 (1985), or in the preservation of a financially weak television station. *Silver King Broadcasting of Vineland, Inc.*, 2 F.C.C. Rcd 324 (1986), *recon. denied, Press Broadcasting Co.*, 3 F.C.C. Rcd 6640 (1988), *aff'd sub nom., Office of Communication of the United Church of Christ v. F.C.C.*, 911 F.2d 803 (D.C. Cir. 1990).

7. On the basis of the showings and representations before us in this case, we find that waiver of our contour-overlap rule would be consistent with the public interest and our previous decisions. We do not agree with NET's contention that the degree of overlap here is *de minimis*. Almost all of our past waiver cases have characterized as *de minimis* only those overlap areas representing less than one percent of both the area and the population of each station. *E.g., Hubbard Broadcasting, Inc.*, 2 F.C.C. Rcd at 7374; *Capital Cities Communications, Inc.*, 59 R.R. 2d at 464 n.21; *KSOO-TV, Inc.*, 43 F.C.C. 2d 879, 880 (1973).*But see Shenandoah Life Insurance Co.*, 19 F.C.C. 2d 704, 706 (1969). Although the overlap area exceeds more than one percent of WWLA's area and population, and is therefore not *de minimis*, it is clear that this area is not so large as to require a finding that WNHT and WWLA will serve "substantially the same area." *See, e.g., WTAR Radio-TV Corp.*, 31 F.C.C. 2d 812, 826 (Rev. Bd. 1970), *recon. denied*, F.C.C. 70-1251 (released December 7, 1970). Concord, New Hampshire, the community of license of WNHT, and Lewiston, Maine, the community of license of WWLA, are separate and distinct markets. Located within the Portland-Poland Spring, Maine ADI, the seventieth largest television market in the country, Lewiston is ninety miles northeast of Concord, which is located within the Boston ADI, the sixth largest. Although a studio in Portsmouth, New Hampshire will provide both stations with identical entertainment programming, each station, pursuant to Section 73.1125(a) of the Commission's Rules, will maintain separate offices and studios within its principal community contour, from which will be produced separate local news and local public affairs programming. NET asserts that the local studios will operate independently and will be staffed with separate management and sales personnel. In addition, the availability of multiple signals in the overlap area, four commercial stations, representing the full complement of networks and Fox, and two educational television stations, provides further assurance against a reduced diversity of voices and an undue concentration of economic control. Moreover, because neither Kennebec nor Hickam, who has only an attributable interest in Kennebec, now has an interest in any other full-power television station, there is no risk of undue concentration.

8. Additionally, as we have recognized in past waiver cases, *see, e.g., Silver King Broadcasting*, 2 F.C.C. Rcd 324 (1986), and most recently in *Taft Broadcasting Partners Limited Partnership*, 7 F.C.C. Rcd 2854 (1992), any marginal decrease in the diversity of viewpoints in the overlap area which may result from granting a contour-overlap waiver is outweighed by the potential for strengthening financially weak television outlets. Here, our grant of the waiver request would not only expedite the return of WNHT to the air, providing Concord with its only local television station, but would also encourage Kennebec to complete construction and commence operation of WWLA. That station would be Lewiston's first local commercial television station and the only independent television station in the Portland-Poland Spring market. Although WWLA initially encountered economic complications, NET asserts that our recent grant of its modification application, to move the transmitter site south toward Portland, Maine's largest city, will allow WWLA to compete effectively with other television stations in the Portland-Poland Spring market.[3] Moreover, the economies of scale that joint entertainment programming will yield offer two UHF stations an opportunity for survival in states with relatively few television outlets.[4]

9. In view of the representations made by the applicant, we conclude that waiver of the contour-overlap rule would be consistent with the public interest in that a struggling station, WNHT, and a nascent station, WWLA, may become economically viable, furnishing both Concord and

553, 554 (1976). We have reviewed the petitioner's allegations and find that they do not raise a substantial and material question as to the applicants' qualifications.

[2] The four commercial television stations which serve the entire Grade B overlap area are: WCSH-TV, Channel 6 (NBC), Portland; WMTW-TV, Channel 8 (ABC), Poland Spring; WGME-TV, Channel 13 (CBS), Portland; and WPXT, Channel 51 (Fox), Portland. The two educational stations are: WCBB, Channel 10, Augusta, Maine, and Channel 26, Biddeford, Maine.

[3] Kennebec's request for a minor modification, BMPCT-910729KT, was granted by the staff on January 16, 1992. The engineering studies submitted in support of the contour-overlap waiver request are based on the modification.

[4] In a supplement to its application, NET provides a proposed combined operating budget of WNHT and WWLA, derived from a letter of intent between NET and Kennebec. That agreement, which established a programming cooperative between the parties, will result in a savings of approximately $335,000 in equipment for WWLA, whose proposed studio will be downgraded in light of the more elaborate WNHT studio to be established in Portsmouth, New Hampshire with studio equipment acquired in the purchase of WNHT. In addition, because of shared administrative and programming and production personnel, both stations will enjoy first-year savings alone of more than $250,000.

Lewiston with their own commercial television services and their own sources of local programming. We further find that the applicants are fully qualified and that a grant of this application will serve the public interest, convenience and necessity.

10. Accordingly, IT IS ORDERED, That the request for waiver of the contour-overlap rule, Section 73.3555(a)(3), to permit common ownership of television stations WNHT and WWLA, IS GRANTED, and That the application seeking consent to the assignment of the license for WNHT from Thomas J. Flatley to New England Television IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Living Faith Ministries, Inc. BPCT-870331LR

For Construction permit for a new Television station on Channel 44, Harlan, Kentucky

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; Released: July 2, 1992

By the Commission:

1. The Commission has before it for consideration the above-captioned application of Living Faith Ministries, Inc., (Living Faith) for a construction permit for a new television station to operate on Channel 44, Harlan, Kentucky.[1] The applicant is the permittee of unbuilt Station WLFB(TV), Channel 40, Bluefield, West Virginia. Living Faith is also the permittee of unbuilt Station WLFG(TV), Channel 68, Grundy, Virginia, which is authorized to operate as a satellite of the Bluefield station. *See Living Faith Ministries, Inc.*, 2 FCC Rcd 7503 (1987). As proposed, the Grade B contour of Channel 44 will overlap that of WLFG(TV), Grundy, Virginia, thus creating a conflict with the contour overlap (duopoly) rule. *See* Section 73.3555 of the Commission's Rules. Living Faith proposes to operate Channel 44 as a satellite of WLFB(TV), Bluefield, West Virginia, pursuant to the exception set forth in Note 5 to the multiple ownership rule. [2]

2. Under the Commission policy concerning television satellite operations, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) (*Satellite Report and Order)* (petitions for partial stay and reconsideration pending), an applicant for television satellite status is entitled to a presumption that the proposed satellite operation is in the public interest if the applicant meets the following three criteria: (1) there is no City Grade overlap between the parent and the satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Satellite Report and Order*, 6 FCC Rcd at 4213-14. Applications that qualify for the presumption, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214. For the reasons set forth below, we find that the proposed operation of Channel 44 as a satellite station is consistent with our satellite policy.

3. With respect to the first criterion needed to qualify for the presumption, the applicant's engineering study demonstrates that there will be no overlap of the City Grade contours of Station WLFB(TV), Bluefield, West Virginia and the facilities proposed for Channel 44. Nor will there be overlap of the City Grade contours of Channel 44 and satellite Station WLFG(TV), Grundy, Virginia. Thus, the satellite proposal meets the first component of the presumption.

4. With respect to the second criterion, applicants can demonstrate that an area is underserved using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it. *Satellite Report and Order*, 6 FCC Rcd at 4215. Our records show that there is no television station licensed to Harlan, Kentucky. Accordingly, the applicant's proposal meets the "transmission test" demonstrating that the proposed satellite station will provide service to an underserved area.

5. Finally, to qualify for the presumption, applicants generally must demonstrate that no other operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. In the case of applicants for a new station seeking satellite authorization, however, an economic showing, such as a history of television station failures in the market or other information indicating that a full-service station is not likely to survive in that market, should be submitted. *See e.g., KMTR, Inc.*, 7 FCC Rcd 1025 (1992). Here, the sole applicant for the Harlan allotment notes that Harlan, Kentucky is a small community of 2,686 persons, the second largest city in Harlan County (population 36,574). It is located on the fringe of the Bristol, Virginia-Kingsport-Johnson City, Tennessee Area of Dominant Influence (ADI), the eighty-fourth largest television market. The ADI is served by four commercial television stations, of which three place a predicted Grade B signal over Harlan.[3] However, the applicant contends that due to Harlan's location near the outer edge of the predicted Grade B signal contours of these stations and the intervening mountainous terrain, which is characteristic of the area, predicted Grade B service to Harlan substantially overestimates actual Grade B signal strength. According to the applicant, less than 10% of Harlan's households receive these three television signals off the air.

6. Additionally, the applicant, Living Faith, maintains that current economic conditions in the community necessitate satellite operation of Channel 44. In this regard, Living Faith states that setbacks in the mining and lumber industries, in large part due to increased cut-backs and mechanization, have resulted in a depressed local economy and dim prospects for any significant growth in either the size of the population or the health of the economy in the

[1] Hereafter, we will refer to the proposed station as Channel 44.

[2] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempted from the multiple ownership rules. *Second Further Notice of Proposed Rulemaking* in Docket No. 87-8, 6 FCC Rcd 5010 (1991). The satellite proposal is unopposed.

[3] The stations are: WCYB-TV (Channel 5, NBC), Bristol, Virginia; WEMT (Channel 39, Fox), Greeneville, Tennessee; and WJHL-TV (Channel 11, CBS), Johnson City, Tennessee.

foreseeable future. According to the applicant, both Harlan and Harlan County have experienced significant declines of population (from 3,347 in 1980 to 2,686 for 1990 in Harlan, and from 41,889 to 36,574 for Harlan County from 1980 to 1990); the 1992 unemployment rates for Harlan and for Harlan County (1) exceed that of Kentucky (almost 7.8%) and the United States (approximately 5.5%); and the $10,385 per capita income of Harlan County residents in 1989, was far less than Kentucky as a whole (approximately $14,000). Moreover, the applicant contends that these population and economic indices, combined with the small size of the predicted service area (24,380 square kilometers and 757,286 persons) which will be further reduced by the mountainous terrain, limits the station's revenue potential. The coverage limitations are further affected by the heavy cable penetration (approximately 91%) in Harlan itself, and the 82% or better average cable penetration rate in nearby communities.

7. The applicant estimates that the satellite facility it proposes could be built for approximately $648,031, and operated at a cost of approximately $172,500 per year (including equipment depreciation), and that revenues from the insertion of local advertising spots will rise from zero for the first six months of operation to approximately $5,000 per month by year five. Based upon these estimates, Living Faith projects that a low-overhead satellite station will not reach the break-even point within the first five years of operation. Living Faith contends that the station would likely experience substantial operating loses in its first full year of operation, with capital construction costs not offset by operating cash flow and little capital appreciation over time. It further contends that if the station were operated as a full-service facility with attendant programming, facilities, and personnel costs (that is, $1.18 million for construction and $1.27-$1.53 million for annual operating costs), the facility would likely cease operations before the end of five years, offering dim prospects of a financial return to the typically prudent investor. However, Living Faith anticipates that the economies of scale will permit it to operate the proposed facility viably. Therefore, Living Faith concludes that the benefits of establishing a viable television satellite operation in Harlan, as proposed, is underscored by the practical reality that the alternative is no television service. We agree and find that Living Faith's proposal meets the third component of the satellite presumption.

8. In view of the above, we conclude that the applicant is entitled to the presumption that the proposed satellite operation of Channel 44 in Harlan, Kentucky is in the public interest. Therefore, having determined that the applicant is qualified in all other respects, we find that grant of the application would serve the public interest.

9. Accordingly, IT IS ORDERED, That the above-captioned application (BPCT-870331LR) for a construction permit for a new television station on Channel 44, Harlan, Kentucky IS GRANTED.

10. The Mass Media Bureau shall send copies of this Memorandum Opinion and Order to the applicant by Certified Mail -- Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In Re Application of

CHARLES N. MORRIS, ESTHER L. MORRIS, FREDDIE E. MORRIS & KEVIN A. RODRIGUEZ — File No. BPH-890928MN

For Construction Permit
for a New FM Station on
Channel 237C2 in
Central, New Mexico

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1992; Released: July 2, 1992

By the Commission:

1. The Commission has under consideration the petition for reconsideration filed on May 3, 1991, and supplemented on June 13, 1991, by Charles N. Morris, Esther L. Morris, Freddie E. Morris, and Kevin A. Rodriguez ("Morris") and an opposition thereto filed by mutually exclusive applicant Mel-Mike Enterprises, Inc. ("Mel-Mike").[1] Morris seeks reinstatement of its above-captioned application, which was dismissed in the Hearing Designation Order in MM Docket No. 91-69, *Classic Radio, Inc.*, 6 FCC Rcd 1835 (MM Bur. 1991) ("*HDO*") (designating two other applications for comparative hearing).[2] For the reasons set forth below, we deny the petition for reconsideration and hold that the application was properly dismissed pursuant to our FM "hard look" processing rules, *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19936 (May 13, 1985) ("*FM Processing Order*"), *recon. denied*, 50 Fed. Reg. 43157 (October 25, 1985), *aff'd sub nom. Hilding v. FCC*, 835 F.2d 1435 (9th Cir. 1987),[3] because it failed to comply with the antenna height limits imposed by the *U.S. Mexico Agreement Concerning Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States - Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T.I.A.S. No. 7697, at 16 ("Agreement"). Our action herein is consistent with recent court precedent, *Malkan FM Associates v. FCC*, 935 F.2d 1313 (D.C. Cir. 1991), *affirming Texas Media Group*, 5 FCC Rcd 2851 (1990). *See also Oxnard Broadcasting, Inc.*, 7 FCC Rcd 2178 (1992); *Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991); *Quinto Broadcasting Corp.*, 6 FCC Rcd 5550 (1991).

BACKGROUND

2. On September 28, 1989, Morris filed its captioned application, which specified an effective radiated power ("ERP") of 10.7 kilowatts ("kW") at an antenna height above average terrain ("HAAT") of 322 meters ("m"). The application proposed Class C2 facilities to be located within 320 kilometers of the Mexican border and was therefore subject to the Agreement. Pursuant to 47 C.F.R. § 73.207(b)(3) and the Agreement, domestic Class C2 allotments are considered as Class B internationally. The Agreement specifies maximum Class B facilities as 50 kW ERP at 500 feet (approximately 152 m) HAAT, but for overheight antennas the ERP must be decreased in accordance with Annex IV of the Agreement. The *HDO* dismissed the Morris application as inadvertently accepted for filing because it exceeded the limitations of Annex IV.[4] The applicant now seeks review of this aspect of the *HDO*.

DISCUSSION

3. In its petition for reconsideration, Morris points out that its proposal met the Class C mileage separation standards set forth in the Agreement, and reprinted at 47 C.F.R. § 73.207(b)(3), with respect to all known Mexican station assignments. Morris also observes that its application requested that the Commission notify Mexico that the allotment should be treated as an international Class C. Further, Morris contends, its application stated that it would reduce its proposed power to comply with the Agreement if Mexican concurrence were not forthcoming. It requested, if necessary, waiver of the Agreement and the "hard look" processing rules. Also, Morris asserts that the dismissal of its application is inconsistent with the treatment given to contemporaneous applications for Channel 289A, Ludlow, California, which were accepted for filing. Finally, Morris asserts that clear notice as to how the Commission would treat applicants requesting international coordination for a higher station class was not provided until May 30, 1991, when the Commission released *Memorandum Opinion and Order*, MM Docket No. 88-375, 6 FCC Rcd 3417, 3423-24 (1991) (FM Class A and C3 Reconsideration Order). Based on these arguments, Morris urges that its application be reinstated. We deny Morris' petition for reconsideration for the following reasons.

4. First, the Agreement's requirement that applications conform to the antenna height and power limitations for the allotments concurred in by Mexico is separate and distinct from its mileage separations requirement. Therefore, Morris' claim that it satisfied Class C mileage separa-

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[1] On June 25, 1991, Mel-Mike filed a motion to strike the Morris supplement. On July 5, Morris opposed the Mel-Mike motion and filed a separate "Request for Leave to File Supplement." We deny the Mel-Mike motion, grant the Morris request, and accept the Morris supplement.

[2] The mutually exclusive Mel-Mike application (File No. BPH-890928MJ) was granted at hearing pursuant to a settlement agreement. *Memorandum Opinion and Order*, FCC 91M-1580, released May 7, 1991.

[3] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265, 7269 (1991).

[4] As Morris concedes, for Class B facilities at its proposed 322 m HAAT, the maximum ERP permitted under the Agreement is 7.7 kW.

tions does not excuse its non-compliance with the antenna height and power limitations specified for the existing international Class B allotment for which it seeks a station assignment. *See Oxnard Broadcasting*, 7 FCC Rcd at 7128-7129.

5. Second, Morris' request that the Commission seek Mexican clearance for its application is, in essence, a request for waiver of our "hard look" processing requirements. *Id.* at 7129 (citing *FM Class A and C3 Reconsideration Order*, 6 FCC Rcd at 3423-24). In any event, Morris explicitly requested waiver of the Agreement and the "hard look" requirements. We affirm the staff's denial of the waiver request for the reasons provided in the *HDO*. That is, a "hard look" waiver will not be granted where other applicants for the same allotment have timely complied with the acceptability criteria. *Id.* To do otherwise and grant a waiver would unfairly prejudice the competing applicants, and the attendant delay in obtaining clearance would disserve the public interest. *Id.; see also Pike Family*, 6 FCC Rcd at 5554; *Quinto Broadcasting*, 6 FCC Rcd at 5550; *Emmy Hahn Limited Partnership*, 4 FCC Rcd 8336 (1989); *Domega Broadcasting Corporation*, 4 FCC Rcd 1450, 1451 & n.3 (1989); *Prime Media Broadcasting, Inc.*, 3 FCC Rcd 4293, 4294 (1988). Also, the Commission is without authority to waive the provisions of an international agreement. *1010 Broadcasting, Inc.*, 59 RR 2d 1124, 1126 (1986).

6. Third, Morris' application was not rendered acceptable for filing by its alternative offer to reduce power to comply with the Agreement should its waiver request be denied. Under the "hard look" processing rules, Morris had until the expiration of the amendment-as-of-right period to bring its application into compliance with the Agreement or else to rest upon its waiver request. It chose the latter. It did not withdraw its waiver request and did not replace its engineering showing with one which complied with the Agreement.[5] To permit an applicant to rely upon both a request for waiver of an acceptability deficiency and an alternative proffer to cure the deficiency would severely disrupt the FM "hard look" processing system. Such procedure would encourage frivolous waiver requests. It would also permit applicants to "end run" around the "hard look" rules by simply requesting waiver of their acceptability deficiencies and simultaneously asserting that they will amend to cure the deficiencies if waiver were denied. This would, in turn, create unwarranted delay; be prejudicial to compliant, competing applicants; and disserve the public's interest in speedy inauguration of new service. *Cf. Mary Ann Salvatoriello*, 6 FCC Rcd 4705 (1991) (purpose of "hard look" rules is to eliminate unfair delays by encouraging problem-free applications and to speed initiation of new FM service); *Premier Broadcasting, Inc.*, 7 FCC Rcd 867 (1992) ("hard look" applicant *may not elect* which of several inconsistent applications to dismiss).[6]

7. Fourth, the Morris application, like the applications in the Ludlow, California proceeding on which it relies, was placed on "Notice of Acceptance for Filing" prior to the staff's engineering study of it, pursuant to the change in processing procedure announced in *Policy Changes in Processing of FM Permit Applications*, 5 FCC Rcd 990 (1990) (*"Policy Changes"*). The Ludlow applications, also like Morris' application, requested Mexican coordination. All these requests were treated as requests for waiver of the Commission's "hard look" processing rules with respect to the requirements set forth in the Agreement. However, while the Ludlow applications were pending before the staff, a comprehensive settlement agreement was filed which proposed the grant of one of the applications (First American's) and the dismissal of the others. The staff approved the settlement and explained:

> Before we can approve the settlement request, however, we must consider the fact that, although each of the proposed facilities is located within 320 kilometers of the Mexican border, none of the applicants complied with the [applicable antenna height and power limitation] set forth in the [Agreement]. Generally, such failure to comply with the U.S.-Mexico Agreement is grounds for summary dismissal of an application pursuant to the FM "hard look" processing rules....Nevertheless, each applicant had requested, by the deadline for filing amendments-as-of-right, that the Commission seek Mexican clearance for its proposal. We regard these requests as, in essence, requests for waiver of our "hard look" processing requirements.... Mexico has, in fact, granted clearance. Because Commission policy permits the surviving applicant in a comprehensive settlement arrangement one opportunity to correct all defects in its application, and grant of Mexican clearance has eliminated the sole defect in the First American application, we waive the "hard look" policy, approve the settlement agreement, and find that First American is fully qualified to be a licensee and that a grant of its application would serve the public interest.

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[5] To support its assertion that it should now be permitted to amend its application to comply with the Agreement, Morris cites *The Dunlin Group*, 5 FCC Rcd 5477 (MM Bur. 1990), and *Van Buren Broadcasting*, 5 FCC Rcd 724 (MM Bur. 1990). Unlike the situation here, those cases do not involve application of an international agreement. Instead, they involve our practice of routinely permitting applicants who slightly exceed the maximum ERP permitted by 47 C.F.R. § 73.211 to cure this deficiency when it results solely from the imprecision inherent in manually ascertaining from the Commission's propagation curves the maximum permissible ERP for a particular HAAT. Here, the defect in Morris' proposal cannot be attributed to any imprecision inherent in ascertaining the maximum ERP permitted by the Agreement. Therefore, Morris' reliance on those cases is misplaced. *See Domega Broadcasting*, 4 FCC Rcd at 1451-1452. Similarly inapposite is *Great Scott Broadcasting*, 6 FCC Rcd 2168 (MM Bur. 1991), where the staff returned amendments which would have caused previously acceptable applications to become unacceptable for filing. Morris' application was never acceptable for filing, and it was never amended to become so.

[6] *Premier Broadcasting* dealt with the "inconsistent application" rule, 47 C.F.R. § 73.3518, which in that case barred the filing of applications which did not comply with the multiple ownership rule, 47 C.F.R. § 73.3555. These rules do not directly pertain here. Nevertheless, our reasons for refusing in *Premier* to honor an applicant's request to elect which of its applications to dismiss, 7 FCC Rcd at 868-70, and our reasons for refusing here to accede to Morris' alternative request to reduce power are analogous.

Letter from Chief, FM Branch re Ludlow CA Proceeding (8920-HTS), dated September 25, 1991 (citations omitted). Here, Morris was not involved in a comprehensive settlement and other applicants for the same allotment complied with the Agreement. Therefore, Morris' application came, not within the cited "hard look" exception set forth in *Policy Changes,* 5 FCC Rcd at 990-91, but within the general rule that "if an application placed on public notice as acceptable for filing is subsequently determined to be unacceptable for filing, may be dismissed as such. *Id.* at 990 (citing 47 C.F.R. § 73.3566). Thus, Morris' application was properly dismissed.

8. Finally, we reject Morris' claim of inadequate notice. The *Malkan* court has held that applicants have had sufficient legal notice of both the technical requirements of the Agreement and the "hard look" rule providing for the return as unacceptable for filing of any application failing to meet those requirements. 935 F.2d at 1318-1320. *See Pike Family,* 6 FCC Rcd at 5552-53.[7]

9. ACCORDINGLY, IT IS ORDERED, That the Petiton for Reconsideration filed on May 3, 1991, and supplemented on June 13, 1991, by Charles N. Morris, Esther L. Morris, Freddie E. Morris, and Kevin A. Rodriguez IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[7] We note that Morris also claims that it had advance discussions with several Commission staff members who indicated that its application would not be dismissed for violating the Agreement. However, Morris' reliance on informal staff advice does not justify its failure to comply with the antenna height and power limitations set forth in the Agreement or warrant affording it another opportunity to amend its application. *Malkan FM Associates,* 935 F.2d at 1319. *See 1010 Broadcasting,* 59 RR 2d at 1126.

Before the
Federal Communications Commission
Washington D. C. 20554

In re Application of

PIKE FAMILY BROADCASTING, INC. File No. BPH-870330MT

For Construction Permit
for a New FM Station on Channel 258A
in Rancho Mirage, California

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1992; Released: July 2, 1992

By the Commission:

1. By Memorandum Opinion and Order in *Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991), we denied an application for review filed by Pike Family Broadcasting, Inc. ("Pike"). We stated there:

> [Pike's captioned application was] properly dismissed pursuant to our FM "hard look" processing rules, *Processing of FM and TV Broadcast Applications*, 50 Fed. Reg. 19,936 (May 13, 1985) (*"FM Processing Order"*), because [it] failed to comply with the antenna height limits imposed by the *Agreement on Radio Broadcasting in the Standard Broadcast Band: Frequency Modulation Broadcasting in the 88 to 108 MHz Band*, Nov. 9, 1972, United States-Mexico, Art. 5, § A(6)(a), 24 U.S.T. 1815, 1830, T.I.A.S. No. 7697, at 16 ("the Agreement"). Our action herein is consistent with recent court precedent, *Malkan FM Associates v. FCC*, [935 F.2d 1313 (D.C. Cir. 1991)], *affirming Texas Media Group*, 5 FCC Rcd 2851 (1990).

6 FCC Rcd at 5552. *See also Quinto Broadcasting Corporation*, 6 FCC Rcd 5550 (1991). On October 24, 1991, Pike filed a petition for reconsideration of that action. For the reasons set forth below, we now deny that petition.[1]

2. In its petition, Pike argues that the Agreement, particularly Article 6(A), "does not automatically require the Commission to reject an application. An application which provides adequate protection to Mexican stations may be notified to Mexico and if Mexico does not object, the application is acceptable under the terms of the... Agreement." Petition at 2. Its application, Pike claims, was not short-spaced to any Mexican facility. Pike therefore concludes that "the application could and should have been notified to Mexico [which] presumably would have made no objection." Petition at 4. Finally, Pike requests that we reinstate its application and notify Mexico at this time.

3. In a recent case, *Oxnard Broadcasting, Inc.*, 7 FCC Rcd 2178 (1992), as well as in a companion case adopted today, *Charles N. Morris et al.*, FCC 92281, adopted June 24, 1992, we rejected arguments essentially identical to Pike's. These cases also hinged upon the proper application of Article 6(A) of the Agreement. This provision requires that applicants conform to allotments previously agreed upon by the United States and Mexico. *Oxnard Broadcasting*, at 2179. The allotment in this proceeding was previously cleared as Class A, both domestically and internationally with Mexico. Pike's application did not conform to the Agreement's antenna power and height limitations for Class A stations of 3 kilowatts effective radiated power at 91 meters height above average terrain. Further, there is nothing in Article 11 (Notification Procedure) of the Agreement to suggest that assignment notifications may depart from the coordinated allotments or may be used to modify those allotments.

4. Next, we find irrelevant Pike's observation that its application was not short-spaced to any Mexican facility. The Agreement's requirements regarding mileage separations between station assignments is separate and distinct from its limitations upon antenna height and power for each station class. Thus, Pike's compliance with the former does not excuse its failure to comply with the latter. *See Charles N. Morris*, at para. 4; *Oxnard Broadcasting*, at 2179.

5. Finally, we deny Pike's request that we reinstate its application and notify Mexico at this time of its proposal. Such a request is, in essence, a request for waiver of our "hard look" processing rules and must be submitted no later than the deadline for filing amendments as of right. *Oxnard Broadcasting*, at 2179; *Charles N. Morris*, at para. 5; *Memorandum Opinion and Order*, MM Docket No. 88-375, 6 FCC Rcd 3417, 3423-24 (1991) (FM Class A and C3 Reconsideration Order). The applicable deadline in this proceeding was June 29, 1987, almost five years ago. Therefore, Pike's request is untimely. Additionally:

> a "hard look" waiver will not be granted where other applicants for the same allotment have timely complied with the acceptability criteria....To do otherwise and grant a waiver would unfairly prejudice the competing applicants, and the attendant delay in obtaining clearance would disserve the public interest.

Charles N. Morris, at para. 5 (internal citations omitted). Seven other applications timely complied with the technical acceptability criteria and were designated for a comparative hearing in this proceeding. *Rancho Mirage Radio, A General Partnership*, 5 FCC Rcd 721 (MM Bur. 1990). Therefore, Pike's request for reinstatement and Mexican notification is without merit.[2]

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[1] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265, 7269 (1991).

[2] We also do not accept Pike's assertion that our dismissal of

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed on October 24, 1991, by Pike Family Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

its application is inconsistent with the Hearing Designation Order in *Mountain Media, Inc.*, MM Docket No. 88-351, DA 88-351, released March 16, 1988 (MM Bur.). That case dealt with a special provision of a bilateral agreement with Canada which permits applications that comply with a previously agreed-upon class but which are short-spaced to Canadian facilities to nonetheless be notified to Canada for clearance. As noted in *Mountain Media*, the Agreement with Mexico has no similar provision. In any event, applications that fail to comply with the antenna height and power limitations specified for their class by either the Mexican or Canadian bilateral agreement are treated similarly, *i.e.*, they are subject to dismissal as unacceptable for filing pursuant to the "hard look" processing rules. *See FM Class A and C3 Reconsideration Order*, 6 FCC Rcd at 3423-24.

Before the
Federal Communications Communication
Washington, D.C. 20554

In re Application of

COACHELLA VALLEY WIRELESS CORPORATION — File No. BPH-890503MG

For a Construction Permit for a
New FM Station on Channel 249A
in Mecca, California

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1992; Released: July 2, 1992

By the Commission:

1. The Commission has before it for consideration an application for review filed on January 18, 1991 by Coachella Valley Wireless Corporation ("Coachella"). Coachella seeks review of the Mass Media Bureau's ("Bureau") action in the Hearing Designation Order ("HDO") dismissing Coachella's application for a new FM broadcast station in Mecca, California, *Playa Del Sol Broadcasters*, 5 FCC Rcd 7606 (MM Bur. 1990).[1]

2. *Background.* Coachella submitted its application for the Mecca, California allotment on May 3, 1989. A technical review of the application revealed that the coordinates contained in Section V-B, FCC Form 301, conflicted with the coordinates plotted on Coachella's USGS 7.5 minute topographic site map. The staff noted a seven second discrepancy between the two sets of coordinates.[2] In the HDO, the staff pointed out that the discrepancy between the coordinates listed in Coachella's application and the coordinates plotted on the USGS 7.5 minute topographical site map made it impossible for the staff to determine the veracity of Coachella's site availability certification, the environmental statement, and the information supplied for FAA approval. As a result, Coachella's application was dismissed as inadvertently accepted for filing.

3. Coachella contends in its application for review that while the proposed transmitter site was incorrectly plotted on the USGS 7.5 minute topographical map, the correct location is identified by the geographic coordinates listed in Section V-B of its application and the staff could have confirmed the correct coordinates by referring to Coachella's FAA Form 7460-1, which was submitted with its application. Additionally, Coachella claims that the staff could have easily verified the correct coordinates by placing a collect telephone call to any one of four numbers Coachella provided in its application. Finally, Coachella contends that the staff has routinely added issues against applicants and requested corrective amendments following adoption of the "hard look" policy and Coachella should be accorded the same treatment. To illustrate, Coachella cites the HDO in the instant proceeding, 5 FCC Rcd 7606, and *Garcia Communications*, 2 FCC Rcd 5477 (MM Bur. 1987), and states that the dismissal of its application was therefore arbitrary and capricious.

4. *Discussion.* The Commission has consistently upheld the Bureau's dismissal of similar applications containing inconsistent coordinates for the proposed transmitter site when they are not proposed to be mounted on an existing tower. *See R. Donnie Goodale*, 7 FCC Rcd 1495 (1992); *Steven B. Courts*, 4 FCC Rcd 4764 (1989); *Benjamin Macwan*, 4 FCC Rcd 4769 (1989); *R. A. D. Broadcasting Corp.*, 4 FCC Rcd (1989); *Nicolasville Broadcasting Company*, 4 FCC Rcd 2574 (1989). A coordinate discrepancy is viewed by the Commission as an acceptability defect. *Steven B. Courts, supra*, at 4767, n.3. It is not until an application is reviewed for technical acceptability that the engineering staff determines whether the geographic coordinates for the transmitter site listed in the application, in fact, match the coordinates for the site as plotted on the transmitter site map. Any application that is not found technically acceptable for filing will be dismissed. *See Report and Order*, 50 Fed. Reg. at 19,945.

5. Coachella, in its application for review, admits that the coordinates on its topographic map were incorrectly plotted but argues that the staff could have confidently resolved the discrepancy by referring to other parts of its application and its FAA Form 7460-1. The Commission has made a commitment in Appendix D to resolve tenderability defects if the necessary information can be derived confidently and reliably from the face of the application.[3] Although a coordinate discrepancy is considered an acceptability defect, the staff will, within reason, none-

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[1] There were originally seven mutually exclusive applicants for the Mecca, California station. Coachella was dismissed while the other six applicants were designated for hearing.

[2] Coachella specified coordinates of $33^{0}38'$ *32.5"* NL in Section V-B of its application and the plotted coordinates on the site map (Figure 2) were $33^{0}38'$ *39.5"* NL. This seven geographic second discrepancy corresponds to a distance of approximately 216 meters (709 feet).

[3] Paragraph 4 of Appendix D of the *Report and Order* states, in pertinent part:

> Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.
>
> a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided....
>
> If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the

theless attempt to resolve any discrepancies found in an application. *Benjamin Macwan, supra,* at 4771, n.3 (1989). In this case, the only conclusion the staff could reach was that one set of coordinates contained in the application was incorrect. Coachella asserts that the source of the discrepancy is an incorrectly plotted topographic map. Equally plausible, however, would be a typographical error in Section V-B and the resultant entering of these coordinates into the computer used to generate the applicant's technical studies. If the error is typographical, then exhibits based on that site, no matter how many, would not eliminate the mistake. Similarly, the coordinates submitted on FAA Form 7460-1, information that the FAA uses to determine a proposed tower's potential to be a hazard to air navigation, are derived from the same information submitted to the Commission on FCC Form 301 and, consequently, are subject to the same errors. Either the applicant listed the coordinates incorrectly in Section V-B of the application and perpetuated the error by transferring the coordinates to the FAA Form 7460-1 and other parts of the application or the coordinates in Section V-B and Form 7460-1 are correct and the applicant incorrectly plotted the coordinates on the topographic site map. Unable to determine which set of coordinates was correct, the staff properly dismissed Coachella's application.

6. With respect to Coachella's contention that the staff failed to call the applicant or one of its agents to determine which coordinates in the application were correct, a coordinate discrepancy is not discovered until after the amendment as of right period has passed and, therefore, it would be inappropriate for the staff to request an amendment to cure the acceptability defect.

7. Coachella's claim of inconsistent treatment among similarly situated applicants is without merit. The Bureau has consistently dismissed applicants whose applications contain inconsistent coordinates for the proposed transmitter site when they are not proposed to be mounted on an existing tower. *See, e.g., Lawrence L. Bush, Jr.,* 3 FCC Rcd 4771 (MM Bur. 1988); *Ocean Waves Broadcasting,* 3 FCC Rcd 4637 (MM Bur. 1988); *Rayne Broadcasting Company, Inc.,* 2 FCC Rcd 7552 (MM Bur. 1987); *PN Radio Company,* 2 FCC Rcd 7358 (MM Bur. 1987); *William M. Piner,* 2 FCC Rcd 7095 (MM Bur. 1987); *Nevada Number One Radio Co.,* 2 FCC Rcd 6668 (MM Bur. 1987); *SEB Broadcasting Inc.,* 2 FCC Rcd 6401 (MM Bur. 1987); *PN Radio Company,* 2 FCC Rcd 4045 (MM Bur. 1987); *Meridian Communications,* 2 FCC Rcd 3630 (MM Bur. 1987). As noted above in paragraph 4, the Commission has upheld the Bureau's dismissal of similar applications containing inconsistent coordinates. The two cases cited by Coachella, the HDO in the instant proceeding and *Garcia Communications,* are inapposite because neither the amendments filed by affected applicants nor the issues specified in those cases involved coordinate discrepancies, or any other acceptability defect.[4] We affirm the Bureau's action.[5]

8. Accordingly, for the foregoing reasons, IT IS ORDERED, That the application for review filed on January 18, 1991 by Coachella Valley Wireless Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

presence of the clearly void data will be treated as functionally equivalent to the absence of such data. In such instances, the defective application will be deemed not sufficient for tender.

50 Fed. Reg. at 19,946.

[4] Moreover, *Garcia Communications* is a HDO adopted by the Chief, Video Services Division, and the applications in that proceeding were not subject to the FM "hard look" processing procedures.

[5] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications,* 6 FCC Rcd 7265 (1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

Lanser Broadcasting Corporation	File No. BR-890526UX
For Renewal of License of Station WWJQ(AM) Zeeland, Michigan	
Beacon Broadcasting Company	File No. BRH-890525VJ
For Renewal of License of Station WJQK(FM) Zeeland, Michigan	
WMAX, Inc.	File No. BR-890522UR
For Renewal of License of Station WMAX(AM) Grand Rapids, Michigan	
Michigan Media, Inc.	File No. BR-890601WI
For Renewal of License of Station WKLQ(FM) Grand Rapids, Michigan	
Regional Broadcasters of Michigan, Inc.	File Nos. BR-890601WF BRH-890601WG
For Renewal of License of Stations WGRD(AM)/WGRD-FM Grand Rapids, Michigan	

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: May 15, 1992; Released: July 2, 1992

By the Commission:

I. INTRODUCTION

1. The Commission has before it for consideration: (i) license renewal applications for the six captioned radio stations; (ii) a Petition to Deny timely filed on September 1, 1989, by the Michigan State Conference of Branches of the National Association for the Advancement of Colored People (NAACP), various local NAACP branches and the National Black Media Coalition (*hereinafter* "NAACP/NBMC") against the above-captioned renewal applications;[1] (iii) oppositions from the licensees; and (iv) the licensees' responses to staff letters of inquiry. NAACP/NBMC allege that the above-captioned stations violated the Commission's equal employment opportunity (EEO) Rule and policies. NAACP/NBMC request that the Commission designate the licensees' renewal applications for hearing and deny the applications.

II. BACKGROUND

2. In challenging an application pursuant to Section 309(d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show . . . that a grant of the application would be *prima facie* inconsistent with [the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1); *Astroline Com. Co. Ltd. Partnership v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988) (*Astroline*); *Application of Dubuque T. V. Limited Partnership and Sage Broadcasting Corporation of Dubuque, Iowa for Assignment of Television License for KDUB-TV, Dubuque, Iowa*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with personal knowledge of the facts alleged. 47 U.S.C. Section 309(d)(1).

3. Filed with the petition to deny were declarations under penalty of perjury from the president of the Grand Rapids, Michigan branch of the NAACP, who lives in the service area of all six stations in the instant case. We find that the declarations meet the requirements for establishing standing for the NAACP. *See American Legal Foundation v. FCC*, 808 F.2d 84 (D.C. Cir. 1987). Therefore, the challenge filed by the NAACP constitutes a valid petition to deny against the six listed stations.

4. The petition contained a statement under penalty of perjury from the chairman of the NBMC, Pluria W. Marshall, a resident of the Washington, D.C. area. However, the Commission has held previously that the statement of a person who does not claim to be a listener of the challenged station or a resident of its service area does not satisfy the standing requirements of the Act. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988); *see also Application of KDEN Broadcasting Co. for Renewal of License of Station KDEN, Denver, Colorado*, 55 Rad.Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that NBMC lacks standing to petition against the six stations and we will treat NBMC as an informal objector in accordance with 47 C.F.R. Section 73.3584(b).

III. PLEADINGS

5. NAACP/NBMC derived their factual allegations from the licensees' EEO programs and annual employment reports. Review of their allegations led us to conclude that NAACP/NBMC presented a *prima facie* case demonstrating that, as to all six stations, unconditional grant of the renewal applications would have been inconsistent with the public interest.[2] Section 309(d)(1) of the Communications Act, 47 U.S.C. Section 309(d)(1). *Astroline*, *supra*. Further inquiry was, therefore, necessary. *See Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501, 506 (D.C. Cir. 1988) (*Beaumont*); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621 (D.C. Cir. 1978) (*Bilingual*).

6. NAACP/NBMC request that the Commission conduct a market-wide investigation of Grand Rapids stations in accordance with Section 403 of the Communications Act of 1934, 47 U.S.C. Section 403, to examine factors behind an alleged market-wide noncompliance with the Commission's EEO Rule, 47 C.F.R. Section 73.2080. Petitioners assert that 12 of the 13 commercial radio stations licensed in Grand Rapids as well as two other stations licensed to adjacent communities are in violation of the Rule. They assert that this is a higher percentage of stations in violation of the EEO Rule than they have observed since 1972. Furthermore, they note that two Grand Rapids television stations were subjected to license renewals with reporting conditions in 1988, and that this combination of factors warrants a market-wide Commission investigation.

7. As NAACP/NBMC properly noted, the Commission may conduct investigations regarding enforcement of any provision of the Communications Act. 47 U.S.C. Section 403. However, we find that a market-wide investigation of the EEO practices of broadcast stations in the Grand Rapids area is not warranted. *See Application of 1972 License Renewal Applications for 28 Broadcast Facilities Licensed to the Philadelphia, Pennsylvania Area*, 53 FCC 2d 104, 110-111 (1975). (*Philadelphia Renewals).* In *Philadelphia Renewals*, the Commission denied a request filed by petitioners in a license renewal case to conduct a market-wide investigation into EEO practices. Noting that in EEO matters licensees submit employment statistics and EEO program reports, the Commission stated, "[a]bsent specific factual allegations, appropriately supported, regarding instances of overt discrimination by licensees, a market-wide hearing would provide us with no additional information." *Id.* at 111. Because the Communications Act and Commission rules focus on actions of individual licensees -- not markets --the Commission stated that any effective market-wide analysis would be based on review of the individual EEO record of each licensee. NAACP/NBMC have failed to present facts which indicate "overt discrimination" either market-wide or on an individual station basis. Thus, there is no reason to depart from our customary practice of reviewing individual EEO records of each licensee. Accordingly, we deny NAACP/NBMC's request for a market-wide EEO investigation.

8. Review of NAACP/NBMC's allegations and supporting documentation as well as each licensee's renewal applications, oppositions and inquiry responses leads us to conclude that there are no substantial and material questions of fact warranting designation for hearing. In addition, we find no evidence that any licensee engaged in discrimination. Thus, grant of each application will serve the public interest. 47 U.S.C. Section 309(d)(2). *Astroline, supra.* Accordingly, we will grant renewal but with remedies and sanctions as noted, *infra.*

IV. DISCUSSION

9. Section 73.2080 of the Commission's Rules requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. Such an assessment enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b) and (c).

10. When a renewal application indicates an absence of discrimination and a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When it fails to evidence a record of adequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission will designate the application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987) (hereinafter *Broadcast EEO), petition for reconsideration pending*; *see also* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See e.g., Beaumont, supra*; *Bilinqual, supra.*

WWJQ(AM)/WJQK (FM), Zeeland, Michigan[3]

11. A review of the licensee's 1989 EEO Program Report, response to the petition to deny and response to our letter of inquiry reveals that WWJQ and WJQK[4] had 22 overall (19 upper-level) full-time hiring opportunities from April 15, 1986, through September 4, 1989. The licensee used several general recruitment sources from which it received some minority referrals: *Holland Sentinel* (1), *Grand Valley Advance* (1), *Holland-Zeeland Flashes* (1), *Broadcasting Magazine* (1), on-air ads (1) and employee referrals (1). It also contacted Michigan State University, Hope College, *Grand Rapids Press*, three high schools, Ottawa County Department of Employment and Training, Michigan Economics for Human Development, Community Action House and Good Samaritan Center, from which it has received no minority referrals. The licensee did not contact any minority-specific sources. However, the licensee claims that it examined and revised its EEO efforts annually from 1984 through 1989. These revisions consisted of contacting additional general recruitment sources including several newspapers, several colleges, a high school and a magazine and starting to broadcast on-air ads. The licensee asserts in a declaration by its president made under penalty of perjury that it maintained records of applicants and interviewees during the license term but that most records were lost after it terminated its program director in July 1989. The records the licensee had available indicate that it interviewed 53 applicants for its full-time openings, including six minorities (11.3%). The six minorities, which included three Blacks and two Hispanics, were interviewed for upper-level positions. The licensee hired an Hispanic woman for a sales position on September 4, 1989, shortly after the Petition to Deny was filed. She was a walk-in applicant. The licensee offered full-time upper-level positions to three Black applicants between 1985 and 1986 but all declined.[5]

12. NAACP/NBMC assert that the licensee has an unproductive EEO program devoid of minority-specific sources. They criticize the licensee for obtaining only one minority applicant, proposing no affirmative action initiatives to locate more applicants, and hiring no minorities during the license term.

13. The licensee asserts that it has always recruited minorities through a variety of sources. Although it did not start using minority sources until after the Petition to

Deny was filed, it asserts that its general sources reach minorities. It also asserts that ads run during the Spanish language program that it airs produced an increase in Hispanic applicants in the last few months of the license term and led directly to it hiring an Hispanic woman full-time. In addition, although its records are incomplete, the licensee asserts that it received at least six minority applicants and probably more. Contrary to NAACP/NBMC's assertion that no affirmative action proposals were undertaken, the licensee notes its periodic self-assessment and initiatives to produce more minority referrals. These include starting an intern program in 1985, which has produced one minority intern (an Hispanic announcer), and adding new recruitment sources each year. The licensee states that there are several reasons why it has not obtained many minority referrals. First, the licensee states that the small number of minorities in the labor force makes recruiting minorities difficult. Second, the licensee asserts that serious financial problems at the beginning of its tenure reduced the funds it could spend on recruitment or salaries. Third, the licensee contends that it had difficulty competing with other area radio stations that offered better pay.

14. The licensee asserts that the Commission should evaluate its EEO record in light of the alternative labor force of Ottawa County, Michigan. The licensee argues that it meets the Commission's criteria for consideration of an alternative labor force as described in *Application of National Capital Christian Broadcasting, Inc., for Renewal of License of Station WTKK (TV), Manassas, Virginia*, 3 FCC Rcd 1919 (1988) (*Manassas*). These criteria include the distance of the station from areas with significant minority population in the MSA, commuting difficulties and the lack of success of recruitment efforts. The licensee states that, although licensed to Zeeland, Michigan, it is located in Holland, Michigan, which is approximately 30 miles from Grand Rapids. The licensee also states that there is no mass transit from Grand Rapids to Holland. It states that it has never had employees from Grand Rapids.

15. We find the licensee's arguments concerning an alternative labor force to be without merit. We have stated previously that, "were a licensee to document that, despite extensive recruitment involving use of minority referral sources, it was unable to obtain qualified applicants from areas of minority concentration in the MSA, reference to alternative labor force data would be appropriate." *Manassas, supra*, at 1920. *See also License Renewal Applications of Certain Broadcast Stations Serving the Chicago Metropolitan Area*, 89 FCC 2d 1031 (1982); *Applications of Certain Broadcast Stations Serving Communities in the States of Indiana, Kentucky and Tennessee*, 54 Rad. Reg. 2d (P&F) 1473 (1983). Here, however, the licensee did not explain what efforts it took to attract qualified minority applicants from the Grand Rapids MSA, and the results of those efforts. While the licensee addressed potential commuting difficulties between Holland and Grand Rapids, it failed to demonstrate that those difficulties were insurmountable. Therefore, there is no indication as to whether the lack of hires from Grand Rapids is due to distance and transportation problems between Holland and Grand Rapids or to the licensee's failure to engage in best efforts to recruit from Grand Rapids. We accordingly do not believe that the licensee has provided an adequate and reasoned basis for using a labor force other than the MSA and we will measure the licensee against the Grand Rapids MSA.

16. After reviewing the record, we find no substantial and material question of fact sufficient to warrant a hearing. In addition, we find no evidence indicating that the licensee engaged in discrimination. In this regard, we note that during the relevant period the licensee had (1) partial recruitment records, (2) minority referrals, and (3) interviewees, and (4) offered full-time upper-level positions to three Black applicants and hired one Hispanic for an upper-level position.

17. However, the record reveals inadequate EEO efforts. The licensee had unproductive general sources and failed to remedy that situation by using minority specific sources. It apparently maintained records on applicants and interviewees during the license term, but claims that most of these records were lost after it filed its renewal application. Because the records are unavailable, we cannot determine the extent to which minorities applied for or were interviewed for the 22 positions. Moreover, even though it asserts that it engaged in annual self-assessment, the licensee made no corrections of the inadequacies such self-assessment should have revealed. Finally, no minorities were employed full-time at the stations until after the petition to deny was filed. Given this record, we believe that imposing reporting conditions is the appropriate remedy. *See Applications of Certain Broadcast Stations Serving Communities in the States of Michigan and Ohio*, 3 FCC Rcd 6944 (1988) (imposing only reporting conditions on Station WXMI-TV, Grand Rapids, Michigan due, in part, to small minority labor force).

WMAX(AM), Grand Rapids[6]

18. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 29 overall and 25 upper-level full-time hiring opportunities from April 15, 1986, through September 30, 1989. The licensee did not maintain records of referrals, applicants or interviewees. The licensee reports that it received so many unsolicited applications, including applications from minorities, that it did not recruit and that all of its hires resulted from walk-in applicants.[7] Three of the licensee's 29 full-time hires were minorities (10.4%) -- a Black announcer, an American Indian sports director and an American Indian clerical employee.[8]

19. NAACP/NBMC assert that they seriously doubt the licensee's assertion that it hired minorities and females despite a lack of recruitment and a total reliance on walk-in applicants. NAACP/NBMC question why the licensee met with success in obtaining qualified minority and female applicants only at the end of the term instead of during the first five years. They also assert that it was not reasonable for the licensee to rely entirely on walk-in applicants when it employed few minorities or females during most of the term.

20. In defense of its record, the licensee asserts that it is a small station located in an area with few minorities and employing an average of nine employees at any one time during the term. It also asserts that it obtained what it considered to be a respectable number of minority and female applicants from walk-ins, although it has no record of the exact figure. The licensee reports that it pays sales personnel on a commission basis and pays salaried employees on a scale lower than that of some local fast-food restaurants. Because of these factors, the licensee asserts it has difficulty competing for qualified minorities who often

look elsewhere for employment after inquiring about openings and discovering the station's low pay and uncertain job security.

21. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. We find no evidence indicating that the licensee engaged in discrimination. In this regard, we note that the licensee did hire some minorities during the license term.

22. However, it appears that the licensee did not have an affirmative EEO program. It chose not to recruit, as is required by our EEO rules, relying instead on unsolicited applications. Moreover, it maintained no records of applicants or interviewees. Thus, it could not engage in self-assessment. We find this case to be similar to *Applications of RadioSouth of Mississippi For Renewal of License of Stations WNAU (AM)/WWKZ (FM), New Albany, Mississippi*, 7 FCC Rcd 1420 (1992). The licensee of WNAU(AM)/WWKZ(FM) received minority referrals from general recruitment sources for its eight hiring opportunities. However, it failed to maintain records of applicants and interviewees and, until the last five months of the license term, failed to implement an EEO program, self-assess its efforts or use minority-specific recruitment sources. During its ownership of the stations, the licensee employed no minorities full-time on a staff that averaged 16 employees. Its labor force was 13.4% Black. We renewed the licenses of WNAU(AM)/WWKZ(FM) subject to a forfeiture of $7,500 and reporting conditions.

23. We recognize that WMAX(AM)'s workforce between 1983 and 1989 averaged only nine employees, compared to an average of 16 at WNAU(AM)/WWKZ(FM), and that its labor force is 4.3% Black. However, we also note that WMAX(AM) had 29 hiring opportunities and did not recruit while WNAU(AM)/WWKZ(FM) had only eight hiring opportunities and received minority referrals from general sources. Neither licensee maintained records of applicants or interviewees. Furthermore, the licensee of WMAX(AM) had no EEO program or self-assessment for the entire term and the licensee of WNAU(AM)/WWKZ(FM) had no program or self-assessment until the last five months of its term. On balance, we believe the same sanction that was applied to WNAU(AM)/WWKZ(FM) also should apply to WMAX(AM). Accordingly, we will renew the license of WMAX(AM) subject to a Notice of Apparent Liability for $7,500 and reporting conditions.

WKLQ(FM), Holland, Michigan

24. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 53 overall full-time hiring opportunities (with an unknown number for upper-level Bpositions) from 1984 through 1988.[9] The licensee indicated that it cannot be certain whether it recruited for each opening or attempted to locate minorities for each opening. The response to our inquiry reveals that the general recruitment sources contacted by the licensee were: *Grand Rapids Press, Radio & Records, Broadcasting Magazine, Fort Wayne Journal Gazette, Holland Sentinel, South Bend Tribune, Jackson Citizen Patriot, Lansing State Journal, Flint Journal, Saginaw News, Kalamazoo Gazette*, Michigan Economics for Human Development, Michigan Employment Security Council, Womens Resource Center, American Women in Radio & Television, Radio Advertising Bureau, Grand Rapids Junior College, Grand Valley State College, and employee referrals. The minority sources contacted were: *Grand Rapids Times, Info Magazine, Community Voice*, MEMPRO, NAACP, Hispanic Institute of the Neighborhood and the Hispanic Center of Western Michigan. The licensee did not maintain records of minority referrals although it reported that it started attempting to track this information in March 1989, two months before the filing of the renewal application. The licensee did, however, maintain records concerning minority applicants and interviewees. Those records show that it obtained 17 applications from minorities. It interviewed 12 minorities and hired three for full-time positions.[10] It also offered a full-time sales position to a Black female applicant in 1987, who declined the offer. The licensee notes that it contacted a number of sources over the term, adding sources periodically, ending with a total of seven minority and several general sources by the end of the term.

25. NAACP/NBMC assert that the licensee's minority recruitment efforts were seriously deficient. They criticize the licensee for using only one minority source for recruitment and employing a small number of minorities during the term.

26. With respect to its failure to document its minority referrals, the licensee states that it now keeps more complete recruitment and hiring records. It argues that it is unreasonable for the Commission to expect the licensee to have maintained more records prior to August 3, 1987, when the rules set forth in *Broadcast EEO* became effective.

27. On the basis of the record before us, we find no substantial and material question of fact warranting a hearing. We find no evidence indicating that the licensee engaged in discrimination and note that the licensee did interview and hire minorities during the license term.

28. However, we are concerned that the licensee has failed to keep adequate records of its EEO efforts on referral source productivity, applicants, interviewees, hire dates, and job categories. We previously have rejected the argument that requiring record-keeping adequate for meaningful self-assessment prior to August 3, 1987, was unreasonable. As we held in *Broadcast EEO*, information on hiring is necessary for a complete review of a licensee's ongoing EEO policies. *Id.* at 3972. Self-assessment is required throughout license terms and was required before the Commission issued *Broadcast EEO*. *See e.g. Leflore Broadcasting Co.*, 65 FCC 2d 556 (1977). Under the circumstances of this case, the licensee did not have a complete picture of its EEO efforts at any time during its license term.

29. We find this case similar to the record of WOLL(FM), Riviera Beach, Florida, as described in *Applications of Certain Broadcast Stations Serving Communities in the Miami, Florida Area*, 5 FCC Rcd 4893 (1990) (*Miami*). That licensee contacted a variety of general and minority sources but did not keep tBrack of minority referrals. The licensee also failed to retain records regarding the race or recruitment sources of interviewees, although it claimed that it had recorded the information and lost it when it changed general managers. The Commission found that the licensee failed to engage in adequate self-assessment of its EEO efforts because of its incomplete record-keeping. Of WOLL(FM)'s 44 hires from 1984-1988, three were Blacks, one of whom was hired for an upper-level position. It employed between 16 and 19 employees at any one time with an average of one or two minority employees in an area with a labor force that is 20.2%

minority (13.8% Black). Consequently, WOLL(FM)'s license was renewed subject to a forfeiture for $3,000 and reporting conditions.

30. While the record of WKLQ(FM) indicates some effort, we find the licensee's self-assessment and record-keeping inadequate to comply with Section 73.2080(c)(2) and (5) of the Commission's Rules. Both WKLQ(FM) and WOLL(FM) failed to maintain complete records necessary for self-assessment during their license terms. Also, while WOLL(FM) recruited but failed to keep track of minority referrals, the licensee of WKLQ(FM), because of deficient records, cannot be certain that it recruited minorities for every opening. Like the licensee of WOLL(FM), WKLQ(FM) employed an average of one minority at any one time. Finally, although its minority recruitment efforts and results were similar to those of WOLL(FM), we note that WKLQ(FM) is located in an area with a smaller minority labor force. Therefore, we will renew WKLQ(FM)'s license subject to a Notice of Apparent Liability for $2,000 and reporting conditions to monitor future adherence to the Commission's EEO Rule.

WGRD(AM)/WGRD-FM, Grand Rapids[11]

31. A review of the licensee's 1989 EEO Program Report, opposition and response to our letter of inquiry reveals that the licensee had 34 overall and 31 upper-level hiring opportunities from March 31, 1986, through March 1, 1989. The response to our inquiry reveals that the general recruitment sources contacted by the licensee were: *Grand Rapids Press*, *Radio & Records*, Broadcasting Publication, Inc., Michigan Employment Security Commission, Womens Resource Center, Grand Rapids OIC, Aquinas College, Grand Rapids Junior College, Calvin College, Grand Valley State College, Kentwood High School, two employment agencies and employee referrals. The minority-specific sources contacted for the above positions were: Grand Rapids Urban League, Grand Rapids Inter-Tribal Council and the Hispanic Center of Western Michigan. The licensee did not maintain complete records of how many referrals came from each source although it reported that it used general and minority sources for all openings. The only minority referrals for full-time positions for which the station had records came from the state employment commission (2), Kentwood High School (1) and Grand Valley State College (1). The licensee's records concerning minority applicants and interviewees are incomplete. The records the licensee was able to provide indicate that it interviewed at least 70 applicants for its 34 full-time openings. None of the interviewees or full-time hires were minorities. However, on August 1, 1989, after it had filed its license renewal applications, the licensee hired a Black announcer part-time and promoted him to full-time on September 1.[12]

32. NAACP/NBMC assert that the licensee used few or no minority-specific recruitment sources and received few minority referrals from the sources it did contact. NAACP/NBMC also assert that the licensee hired almost no minorities during the license term and that the licensee appeared to have abandoned its written EEO program filed in 1989. Finally, they suggest that the licensee's job hire data may be incorrect because the licensee reported that only two of its 37 hires were for upper-level positions although its employment reports indicate almost all of its employees are in upper-level positions.

33. In defense of its record, the licensee notes that it contacted minority-specific sources and added them to its list of recruitment sources in March 1987 after assessing the productivity of its recruitment efforts. Acknowledging that it received few minority referrals, the licensee notes that it increased its efforts in March 1987 to try to obtain more referrals. The licensee contends that two of NAACP/NBMC's assertions may have been made due to incomplete information. The licensee states that it failed to include all of the sources it contacted when it reported on its efforts in its renewal application. Indicating that it omitted the unproductive sources, the licensee filed an amended EEO Program Report (FCC Form 396) in order to reflect complete information. Contrary to the petitioners' assertion that the licensee abandoned its EEO program, the licensee asserts that it contacted all the sources listed in paragraph 29, *supra*, periodically adding sources over the course of the license term, and that it recruited actively for each opening. Without giving a reason for the original erroneous filing, the licensee filed a corrected renewal EEO form (Form 396) indicating that 34, not two, of its hires in the renewal year were for upper-level positions.

34. The licensee states that the primary reason for its limited success in obtaining minority referrals is the small minority labor force in the Grand Rapids MSA. It states that it does not discriminate and in fact actively recruits minorities for every opening. Moreover, the licensee points out that it has hired minorities.

35. In view of the foregoing, we find no substantial and material question of fact warranting a hearing. We find no evidence indicating that the licensee engaged in discrimination. In particular, we note that the licensee obtained minority referrals and hired a minority during the term.

36. However, we are concerned that the licensee has failed to keep adequate records of its EEO efforts, such as complete records on referral source productivity, applicants and interviewees. More complete records are essential for adequate self-assessment. We are also concerned that the licensee apparently interviewed no minorities despite 34 hiring opportunities over three years and employed only one minority between 1985 and August 1989. In this regard, we note that, despite the small number of minorities in the labor force, other radio stations in the Grand Rapids MSA have been able to recruit minority applicants; for example, as described above, WKLQ(FM) interviewed 12 minority applicants for 53 openings and WWJQ(AM)/WJQK(FM) interviewed six minorities for 22 openings during the same time period.

37. We find this case similar to but less egregious than the record of WNOG(AM)/WCVU(FM), Naples, Florida, as described in *Applications of Certain Broadcast Stations Serving Communities in the Sarasota, Florida Area and Other Florida Communities*, 5 FCC Rcd 5683 (1990) (*Sarasota*). The record of the race of applicants at WNOG(AM)/WCVU(FM) was incomplete. The licensee contacted some minority sources but was unable to determine their usefulness due to incomplete records on referrals. Overall, the licensee failed to maintain records necessary for adequate self-assessment. Of 170 interviewees at WNOG(AM)/WCVU(FM), five were minorities. Of 44 hires from 1984 to 1988, none were minorities in a labor force that is 14.0% minority (3.6% Black, 9.9% Hispanic). Consequently, the licenses of WNOG(AM)/WCVU(FM) were renewed for less than a full term, subject to a Notice of Apparent Liability for $15,000 and reporting conditions.

38. Unlike WNOG(AM)/WCVU(FM), the licensee in the instant case is located in an area with a smaller minority labor force, had fewer hiring opportunities and hired a minority in an upper-level position, albeit in the last two months of the term. However, because the record of WGRD(AM)/WGRD-FM is similar to that of WNOG(AM)/WCVU(FM), we conclude that renewal subject to a Notice of Apparent Liability for $5,000 and reporting conditions to monitor future performance is warranted.

V. CONCLUSION

39. After considering the evidence and arguments submitted by NAACP/NBMC and all licensees in the instant case, we find that hearings are not warranted and the records of the licensees support the granting of their renewal applications. We also find that a market-wide investigation into Grand Rapids broadcasters' EEO practices is unwarranted. Because of concerns about future affirmative action efforts, we will impose reporting conditions on each of the stations. In addition, we will issue Notices of Apparent Liability of $2,000 to the licensee of WKLQ(FM), $5,000 to the licensee of WGRD(AM)/WGRD-FM and $7,500 to the licensee of WMAX(AM) for violations of the Commission's EEO Rule.

VI. ORDERING CLAUSES

40. Accordingly, IT IS ORDERED that the Petition to Deny filed by the NAACP against all stations in the instant case IS DENIED.

41. IT IS FURTHER ORDERED that the informal objection filed by the NBMC against all stations in the instant case IS DENIED.

42. IT IS FURTHER ORDERED that the NAACP/NBMC's request for a market-wide investigation in accordance with 47 U.S.C. Section 403 into the EEO practices of Grand Rapids broadcasters IS DENIED.

43. IT IS FURTHER ORDERED that the license renewal applications filed by Lanser Broadcasting Corporation for Station WWJQ(AM), Beacon Broadcasting Company for Station WJQK(FM), WMAX, Inc. for Station WMAX(AM), Michigan Media, Inc. for Station WKLQ(FM), and by Regional Broadcasters of Michigan, Inc. for Stations WGRD(AM)/WGRD-FM ARE GRANTED subject to the EEO reporting conditions specified herein.[13]

44. IT IS FURTHER ORDERED that, pursuant to Section 503 of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, this document constitutes a NOTICE OF APPARENT LIABILITY FOR FORFEITURE in the amount of $7,500 for the licensee of WMAX(AM), $2,000 for the licensee of WKLQ(FM) and $5,000 for the licensee of WGRD(AM)/WGRD-FM.

45. IT IS FURTHER ORDERED that the licensees of Stations WWJQ(AM), WJQK(FM), WMAX(AM), WKLQ(FM) and WGRD(AM)/WGRD-FM file an original and one copy of the following information on June 1, 1993, June 1, 1994, and June 1, 1995:

(a) For each report, a list of all job vacancies during the twelve months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source of each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[14]

(b) a list of employees as of the May 1, 1993, payroll period for the first report and as of the May 1, 1994, and the May 1, 1995, payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

46. IT IS FURTHER ORDERED, that the Mass Media Bureau send by Certified Mail -- Return Receipt Requested -- one copy of this Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

47. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should the parties have any questions regarding this action, they may telephone the Mass Media Bureau's EEO Branch at 202-632-7069. Regarding the forfeiture proceedings for WMAX(AM), WKLQ(FM) and WGRD(AM)/WGRD-FM, the licensees may take any of the actions set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order and Notice of Apparent Liability. Any comments relating to their ability to pay should include those financial letters set forth in the noted attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Petition to Deny also includes 27 other radio stations in Michigan. They will be addressed in separate Commission actions.

[2] The licensees were not challenged regarding their recruitment of women, although petitioners criticized some aspects of female recruiting practices by the licensee of WMAX(AM). Nonetheless, as is our practice in all cases, we reviewed each licensee's EEO efforts in this respect, including WMAX(AM), and found them all to be sufficient.

[3] All six stations addressed in this *Order* are located in the Grand Rapids, Michigan MSA, which is 42.3% female and 7.3% minority (4.3% Black, 2.0% Hispanic, 0.6% Asian and 0.4% American Indian).

[4] WWJQ(AM) and WJQK(FM) are treated as one employment unit.

[5] The licensee employed no minorities full-time from the time it acquired the AM station on November 8, 1983, until three weeks before the end of the license term. According to its Annual Employment Reports, the licensee had 16 overall employees, 13 upper-level, in 1989. In 1988, the licensee had 15 overall employees, 14 upper-level. In 1987, the licensee had 14 employees, all upper-level. In 1986, the licensee had 13 employees, 11 upper-level. In 1985, the licensee had 15 employees, 14 upper-level. In 1984, the licensee had 14 employees, 12 upper-level.

[6] The licensee acquired the station in August 1982. On November 25, 1991, WMAX, Inc., the licensee, filed an application for assignment of its license to Grand Valley State University.

[7] All nine of the licensee's full-time employees in September 1989, filed declarations under penalty of perjury stating that they applied on their own initiative without prior notice of openings.

[8] Although no minorities showed up on Annual Employment Reports (FCC Form 395-B) from 1986 to 1989, the licensee states that it hired three minorities during the term who did not remain in employment long enough to be included on the Annual Employment Reports. From 1983 - 1989, the licensee reported having from six to 12 employees overall, from six to 11 in upper-level positions. The only minority employee reported was in 1985, when the licensee had seven employees overall, all upper-level, of whom one (14.3%) was a Black woman.

[9] The licensee acquired the station on January 5, 1984.

[10] According to the licensee's Annual Employment Reports, in 1989, the licensee employed 25 employees overall, 19 upper-level, of whom one (4.0%) was a minority in an upper-level (5.3%) position. In 1988, the licensee employed 26 employees overall, 24 upper-level, with no minorities. In 1987, the licensee employed 27 employees overall, 24 upper-level, with no minorities. In 1986, the licensee employed 24 employees overall, 21 upper-level, of whom one (4.2%) was a minority in a lower-level position. In 1985, the licensee employed 20 employees overall, 18 upper-level, of whom one (5.0%) was a minority in a lower-level position. In 1984, the licensee employed 15 employees overall, 13 upper-level, of whom one (6.7%) was a minority in a lower-level position.

[11] On May 14, 1990, the licensee of WKTH(AM)/WGRD-FM changed the call sign of its AM station to WGRD(AM). On January 1, 1990, the licensee of these two stations filed an application for transfer of their licenses from Edith Martin and Howard Phipps, Jr. to Susan Cochran and Norman Volk.

[12] Except as noted, the licensee employed no minorities from 1987 to 1989. In 1989, the licensee employed 21 employees overall, 20 upper-level. In 1988, the licensee employed 25 employees overall, 23 upper-level. In 1987, the licensee employed 23 employees overall, 21 upper-level. In 1986, the licensee employed 22 employees overall, 20 upper-level, of whom one (4.6%) was a minority employee in a lower-level position. In 1985, the licensee employed 22 employees overall, 12 upper-level, none of whom were minorities. In 1984, the licensee reports that it employed one Asian in a lower-level position but is not able to locate more information about 1984, or account for the lack of 1984 information. In addition, Commission records do not include the 1984 Report. In 1983, the licensee employed 25 employees overall, 21 upper-level, none of whom were minorities.

[13] In this regard, we are mindful of an application for assignment of license of WMAX(AM) from WMAX Inc. to Grand Valley State University (File No. BAL-911125EB) and an application for transfer of the licenses of Stations WGRD(AM)/WGRD-FM from Edith Martin and Howard Phipps, Jr. to Susan Cochran and Norman Volk (BTC-900109HP and BTCH-900109HQ). In the event that any of these licenses are transferred to a new licensee, the reporting conditions will apply to the assignee upon the consummation of the sale or the transfer. *See Woolfson Broadcasting Corporation*, 4 FCC Rcd 6160 (1989); *Arcadia, Florida*, 5 FCC Rcd 3748, 3750 n.8 (1990); *License Renewal Application of Duffy II Corporation For Station KESZ-FM, Phoenix, Arizona*, 6 FCC Rcd 1876, 1879 n.4 (1991).

[14] Such a list might start:

(1) News Director: Officials and Managers; Full-time.

3 Applicants:	1 White female	A.W.R.T.
	1 Black male	Urban League
	1 Black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League and NAACP.

Selected: Black male (3/19/92).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

WADE AXELL
(Assignor)

and File No. BAPCT-891006KK

SAINTE LIMITED
(Assignee)

For Assignment of Construction
Permit for Station KVMG(TV),
Channel 51, Merced, California

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; Released: July 2, 1992

By the Commission:

1. The Commission has before it an unopposed application to assign the construction permit of unbuilt Station KVMG(TV), Merced, California, from Wade Axell (Axell) to Sainte Limited (Sainte). Sainte is the licensee of Station KCSO(TV), Modesto, California, and proposes to operate KVMG(TV) as a satellite of KCSO(TV) pursuant to the exception to the duopoly prohibition for satellite operations set forth in Note 5 to the Commission's multiple ownership rules, Section 73.3555.[1]

2. Under our television satellite policy, *Television Satellite Stations*, 6 FCC Rcd 4212 (1991) ("*Satellite Report and Order*") (petitions for partial stay and reconsideration pending), applicants for television satellite status will be entitled to a presumption that the proposed satellite operation is in the public interest if the applicants meet the following three criteria: (1) there is no City Grade overlap between the parent and the proposed satellite; (2) the proposed satellite would provide service to an underserved area; and (3) no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. *Id.* at 4213-14. Applicants that qualify for the presumption, when unrebutted, will be viewed favorably by the Commission. *Id.* at 4214. For the reasons set forth below, we find that the proposed operation of KVMG(TV) as a satellite station is consistent with our new policy.

3. With respect to the first criterion needed to qualify for the presumption, there is no overlap of the City Grade contours of KVMG(TV) and KCSO(TV).[2] Thus, the satellite proposal meets the first component of the presumption.

4. With respect to the second criterion, applicants can demonstrate that an area is underserved by using one of two tests. The first is a "transmission test," whereby a proposed satellite's community of license is considered underserved if there are two or fewer full-service stations already licensed to it. *Satellite Report and Order*, 6 FCC Rcd at 4215. Apart from the construction permit for KVMG(TV), our records show that there are no full-service television stations authorized in Merced, California. Accordingly, the proposal meets the "transmission test" demonstrating that the proposed satellite station will provide service to an underserved area.

5. Finally, to qualify for the presumption, applicants must demonstrate that no alternative operator is ready and able to construct or to purchase and operate the proposed satellite as a full-service station. Here, the seller states that, other than the owner of Sainte, only two individuals made inquiry into the possible purchase of the facility, neither of whom followed up on the initial contact. In addition, letters were submitted from two media brokers stating that the likelihood of securing a buyer for the facility to operate a full-service stand-alone station is minimal. The reasons include the small size of the market, the location of Merced on the fringe of several highly saturated television markets and difficulty of obtaining financing for start-up broadcast facilities in today's economy.[3] Based on this showing, we believe that the third criterion of the standard has been met.

6. Therefore, Sainte Limited has established the basis for presuming that satellite operation should be authorized, and we find no evidence suggesting that the presumption not be followed in this case. Accordingly, we find that Sainte's proposed satellite operation of KVMG(TV) is in the public interest. In view of the foregoing, and having determined that the applicants are qualified in all other respects, we find that a grant of the application would serve the public interest.

7. Accordingly, IT IS ORDERED, That the above-captioned application to assign the construction permit of station KVMG(TV), Merced, California, from Wade Axell to Sainte Limited (File No. BAPCT-891006KK) IS HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] We note that there is an outstanding proceeding concerning television satellite stations, which invites comment on whether television satellites should be exempt from the multiple ownership rules. *Second Further Notice of Proposed Rule Making* in Docket No. 87-8, 6 FCC Rcd 5010 (1991).

[2] Sainte presently has on file a modification application to relocate the transmitter for station KCSO(TV). However, there will be no City Grade overlap of the stations regardless of whether KCSO(TV) is moved to its proposed location or remains at its present site.

[3] These brokers considered the possibility of finding a buyer so unlikely that they requested a retainer of $10,000 just to place the station on the market, rather than receive a percentage of the sale price at closing.

Before the
Federal Communications Commission
Washington, D.C. 20554

PROFESSIONAL COMMUNICATIONS, INC. File No. 26493-CD-P/ML-01-90

For facilities in the Public Land Mobile Service for station KNKD991 at Warren, Pennsylvania

ARCH CAPITOL DISTRICT, INC. d/b/a PAGE NEW YORK File No. 27127-CD-P/ML-01-90

For facilities in the Public Land Mobile Service for station KPD955 at Jamestown, New York

MEMORANDUM OPINION AND ORDER

Adopted: June 19, 1992; Released: July 6, 1992

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Professional Communications, Inc. (Professional) filed an application to change frequencies from 152.09 MHz to 454.450 MHz in the Public Land Mobile Service (PLMS) for station KNKD991 at Warren, Pennsylvania. Arch Capitol District, Inc. d/b/a Page New York (Arch) filed a mutually exclusive application to add frequency 454.450 MHz for station KPD955 at Jamestown, New York. The applications were sent to lottery and Professional's application was selected first. See Public Notice PMS-49, released March 20, 1992. Arch filed an informal petition to deny Professional's application, and responsive pleadings were filed.[1] For the reasons stated below, we deny the petition and grant Professional's application.

II. DISCUSSION

2. Arch argues that Professional's application should be dismissed as defective for failure to include a traffic loading study pursuant to Sections 22.16 and 22.516 of the rules. Arch concedes that no loading studies are required when an applicant merely seeks to exchange an operating frequency for a new frequency. However, Arch also argues that Professional's 152.09 MHz frequency is not in operation.[2] Arch states that Professional is currently authorized to operate on several other two-way frequencies in the Warren area. Accordingly, Arch asserts Professional should be required to submit a loading study demonstrating the need for an additional two-way channel.

3. Professional responds that the 152.09 MHz frequency is in operation at Warren and is mounted on the tower in conjunction with its companion 158.70 MHz antenna. Professional further states that due to technical problems caused by wind stress, facilities at the site were temporarily discontinued for various periods of time between mid-April and early June of 1991, but that these problems have been remedied. Professional states that it is seeking to exchange an operating frequency for a new frequency and that traffic load studies are not required.

4. Traffic loading studies are required when an applicant (1) requests more than one frequency for a new two-way facility, or (2) requests additional frequencies for an existing two-way facility. See Sections 22.16, 22.516 of the rules. The rules do not require loading studies when the applicant merely seeks to exchange one frequency for another. *Id.* Furthermore, Professional has explained that while there were temporary periods of non-operation due to technical problems, these problems have been corrected, and the 152.09 MHz frequency is operating. Accordingly, we find that Professional is merely seeking to exchange its operating 152.09 MHz frequency for a new frequency, and that traffic loading studies are not required.[3] We further find that Professional is legally and technically qualified to operate on the 454.450 MHz frequency, and that grant of Professional's application will serve the public interest. We therefore deny the informal petition to deny and grant Professional's application.

III. ORDERING PARAGRAPHS

5. Accordingly, IT IS ORDERED that the informal petition to deny filed by Arch Captiol District, Inc., IS DENIED.

6. IT IS FURTHER ORDERED that the application filed by Professional Communications, Inc., File No. 26493-CD-P/ML-01-90, IS GRANTED.

7. IT IS FURTHER ORDERED that the application filed by Arch Capitol District, Inc., d/b/a Page New York, File No. 27127-CD-P/ML-01-90, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

John Cimko
Chief, Mobile Services Division
Common Carrier Bureau

[1] Arch's petition was filed over 10 months after the deadline for filing formal petitions to deny. See Section 22.30(a)(4) of the Commission's rules. Accordingly, Professional submitted its petition as an informal request for Commission action pursuant to Section 1.41 of the rules.

[2] Arch states that it inspected the Warren site on May 10, 1991, and monitored the 152.09 MHz frequency from 9:30 A.M. to 3:30 P.M. Arch further states that the 152.09 MHz antenna was not in place on the tower, and that the frequency was silent.

[3] Arch also argues that it applied for the 454.450 MHz frequency in order to expand its existing 454.450 MHz wide-area system, and that there are other two-way frequencies available which Professional could use. However, the existence of a wide-area system does not give Arch any special right to the 454.450 MHz frequency. Furthermore, the Commission's rules do not require Professional to identify or apply for alternative frequencies. Accordingly, Arch's argument is rejected.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

The Ameritech Operating Companies 1992 Annual Access Tariff Filing — Transmittal Nos. 617, 624 and 628

Motion for Stay

ORDER

Adopted: June 26, 1992; Released: June 26, 1992

By the Chief, Common Carrier Bureau:

1. On June 23, 1992, the Ameritech Operating Companies (Ameritech) filed a Request for Stay[1] of the Common Carrier Bureau's 1992 Annual Access Tariff Order.[2] Ameritech asks for a stay of the requirement that price cap sharing amounts be allocated based upon relative basket revenues. Carriers that did not allocate sharing amounts based on this method were ordered to refile corrected tariffs June 29, 1992. For the reasons discussed below, Ameritech's requested stay is denied.

2. Ameritech argues, based on the four part showing for a preliminary injunction articulated in *Virginia Petroleum Jobbers*,[3] that a stay pending action on an application for review is warranted, and that an accounting order can protect ratepayers if Ameritech's arguments are ultimately rejected. Ameritech Request at 1-2.

3. According to Ameritech, allocating sharing obligations on the basis of earnings is a better approach because customers of the basket that generated the sharing obligation receive a corresponding sharing benefit. *Id.* at 2. A revenue-based allocation, in contrast, results in rate adjustments to baskets that did not generate the sharing obligation, Ameritech states. Consequently, says Ameritech, those baskets "... will realize less of a return than they are entitled to." Ameritech further argues that the Commission in adopting price cap regulation for local exchange carriers rejected calls to mandate any particular allocation scheme, and that its earnings-based method is cost-causative and proper. *Id.* These arguments were raised and addressed in the *1992 Annual Access Order.*

4. In the *LEC Price Cap Order*,[4] the Commission decided that, to guard against possible miscalibration of its price cap indexes, both a sharing and low end adjustment would correct high or low earnings experienced by price cap carriers.[5] In designing these mechanisms, the Commission considered whether adjustments should be triggered based on basket earnings or total interstate earnings. The Commission decided that triggering these mechanisms based on total interstate earnings was most consistent with the use of sharing and low end adjustment mechanisms as a "backstop" to the price cap formula.[6] Thus, the Commission specifically rejected the notion that basket-by-basket rates of return have significance to the way in which sharing amounts are allocated among baskets.[7]

5. Ameritech's central argument, that it is "entitled to" a minimum rate of return for a particular basket in a price cap system, re-argues a rulemaking decision that is now final. We therefore conclude that Ameritech is likely to lose on the merits of its appeal to the Commission.

6. Asserting irreparable harm, Ameritech states that it must lower Carrier Common Line and Traffic Sensitive rates to effect sharing of its excess earnings. Ameritech then asserts that it must either raise Special Access and Interexchange rates to make up the difference, or leave these rates stable and experience lower earnings. Ameritech Request at 2. Thus, the irreparable harm alleged is lower earnings resulting from a decision not to raise Special Access and Interexchange rates. The price cap rules establish an earnings zone. Earnings within this band are deemed reasonable. Ameritech makes no showing that its earnings will not fall within the earnings zone as a result of the *1992 Annual Access Order.* Therefore, we conclude that Ameritech has not demonstrated an injury that would be avoided by grant of the stay.

7. Finally, neither the price cap rules nor the *1992 Annual Access Order* preclude Ameritech from adjusting rates in baskets as it deems appropriate. The rules provide pricing flexibility within bands and procedures to file prices out of band as well as procedures to adjust the indices. 47 C.F.R. §61.49. Therefore, Ameritech has failed to prove that it will suffer irreparable harm as a result of the Bureau's action.

8. Therefore, IT IS ORDERED, that the Ameritech Operating Companies' Request for Partial Stay of the 1992 Annual Access Tariff Filings Order IS DENIED.

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[1] Ameritech also filed an Application for Review at the same time it filed its Request for Stay, which it provided as Attachment I to the Request for Stay.

[2] In the Matter of 1992 Annual Access Tariff Filings, Memorandum Opinion and Order, DA 92-841 (released June 22, 1992) (Annual Access Order).

[3] *See Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *as modified by Washington Metropolitan Area Transit Commission v. Holiday Tours*, 559 F.2d 841, 843 (D.C. Cir. 1977). The four factors to consider in evaluating a request for a stay are: "(1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its appeal?... (2) Has the petitioner shown that without such relief, it will be irreparably injured?... (3) Would the issuance of a stay substantially harm other parties interested in the proceedings?... (4) Where lies the public interest?...."

[4] Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786 (1990); and Erratum, 5 FCC Rcd 7664, (1990) (*LEC Price Cap Order);* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637 (1991) (*LEC Price Cap Reconsideration Order), appeal docketed, D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[5] *LEC Price Cap Reconsideration Order* at 2676 (para. 86).

[6] *LEC Price Cap Order* at 6805 (para. 151); *LEC Price Cap Reconsideration Order* at 2679 (para. 92, 94).

[7] *LEC Price Cap Order* at 6805 (para. 151).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 30, 1992

U S WEST COMMUNICATIONS, INC.
AND EMERY COUNTY FARMERS' UNION
TELEPHONE ASSOCIATION JOINT PETITION
FOR WAIVER OF PART 36, APPENDIX
GLOSSARY, OF THE COMMISSION'S RULES
(AAD 92-45)

On June 10, 1992, US West Communications, on behalf of its operating affiliates, The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company, and Pacific Northwest Bell Telephone Company (US West) and Emery County Farmers' Union Telephone Association (Emery) filed a joint petition for waiver of the definition of "study area" as set forth in the Appendix Glossary of Part 36 of the Commission's Rules. This waiver would allow US West and Emery to adjust their Utah study area boundaries in light of the recent sale of the Huntington exchange from US West to Emery.

Parties may file comments on this petition no later than **July 17, 1992**. Replies should be filed by **July 31, 1992**. Comments should reference AAD 92-45. A copy of each pleading should be sent to Jacqueline Spindler, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to Downtown Copy Center (DCC), 1114 21st Street, N.W., Washington, D.C. 20036, (202) 452-1422. Copies are available for public inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., Room 812, Washington D.C.; copies are also available from DCC.

For further information contact Jacqueline Spindler at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA
DE PUERTO RICO

US SPRINT COMMUNICATIONS
COMPANY LIMITED PARTNERSHIP

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

MCI File No. I-T-C-92-106
INTERNATIONAL, INC.

ST. THOMAS AND
SAN JUAN TELEPHONE
COMPANY, INC.

TRT/FTC
COMMUNICATIONS, INC.

GTE HAWAIIAN
TELEPHONE COMPANY
INCORPORATED

WORLD COMMUNICATIONS, INC

Joint Application for Authorization
under Section 214 of the Communications
Act of 1934, as amended, to construct
and operate the TAINO-CARIB fiber optic
submarine cable system extending between
Puerto Rico and St. Thomas in the U.S.
Virgin Islands and the British Virgin
Islands

ORDER AND AUTHORIZATION

Adopted: June 25, 1992; Released: July 8, 1992

By the Chief, Common Carrier Bureau:

1. The Commission has before it for consideration a joint application filed by the above-captioned applicants (hereinafter collectively referred to as "Joint Applicants") for authority under Section 214 of the Communications Act of 1934, as amended, to construct and operate a fiber optic submarine cable (TAINO-CARIB) system extending between Puerto Rico, St. Thomas in the U.S. Virgin Islands, and Tortola in the British Virgin Islands. The application was placed on public notice on February 19, 1992. No comments were received.

2. The proposed TAINO-CARIB system will consist of six fiber pairs between Puerto Rico and St. Thomas and six fiber pairs between St. Thomas and Tortola, with each fiber pair operating at a speed of 560 Mbps. The TAINO-CARIB cable will have a design capacity equivalent to 45,360 64-Kbs circuits.[1]

3. Upon review of the application, we find that grant of Section 214 authorization for Joint Applicants to construct and operate the TAINO-CARIB cable system will serve the public interest. The cable system will provide much needed connectivity with other digital cable systems in the region, thereby increasing service reliability. Because of the increased connectivity provided by the TAINO-CARIB system, both route and path diversity will be increased and the Joint Applicants will be able to utilize restoration alternatives that are not presently available.

4. Accordingly, IT IS ORDERED that Joint Application File No. I-T-C-92-106 IS GRANTED and the Joint Applicants are authorized to:

(a) construct and operate a digital fiber optic submarine cable system (TAINO-CARIB) extending between Puerto Rico, St. Thomas in the U.S. Virgin Islands and Tortola in the British Virgin Islands;

(b) acquire and activate capacity in the TAINO-CARIB cable system, on an ownership basis, in the number of MIUs (Minimum Investment Unit which consists of a usable 2.048 Mbps circuit plus 162.5 Kbps required for multiplexing) specified in Schedule D appended hereto;

(c) acquire capacity, by lease, in such connecting facilities as may be required to extend capacity in the TAINO-CARIB cable system in Puerto Rico and the U.S. Virgin Islands; and

(d) activate and operate capacity in the TAINO-CARIB cable system and aforementioned extension facilities for the provision of the Joint Applicants' authorized telecommunications services.

5. IT IS FURTHER ORDERED that when a given Joint Applicant seeks to acquire or transfer an ownership or IRU interest in the TAINO-CARIB capacity, the reimbursement it receives shall be on the basis of depreciated original cost (or the pro-rated accumulated cost of such circuit if the systems are not then operational) or in conformance with such policy as the Commission shall develop in the future regarding the price at which IRUs will be made available.

6. IT IS FURTHER ORDERED that the Joint Applicants shall make available half-interests in the TAINO-CARIB capacity to such present and future U.S. carriers as may be authorized by the Commission to acquire such capacity.

7. IT IS FURTHER ORDERED that all Joint Applicants' tariffs must state that its customers may not resell international private lines leased from any Joint Applicant or connect them to the public switched network for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a country-specific finding of resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of Interna-*

tional Accounting Rates, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), *petitions for reconsideration pending*.

8. IT IS FURTHER ORDERED that the Commission retains jurisdiction to reallocate U.S. carriers' interests in capacity herein authorized, as the public interest may require to accommodate additional carriers or otherwise, with, where required, the concurrence of the foreign administration or carriers concerned, and, further, jurisdiction is retained by the Commission over all matters relating to the Joint Applicants' ownership, management, maintenance, and operation of the cable system as authorized herein, to assure the most efficient use not only of this cable system, but of all means of communications between the U.S. and points served by the TAINO-CARIB cable system.

9. IT IS FURTHER ORDERED that the Joint Applicants shall include TAINO-CARIB facility use in the monthly Circuit Status Reports filed pursuant to the Commission's Orders. These reports shall be filed no later than the 20th day of each month providing the information for the preceding month.

10. IT IS FURTHER ORDERED that the Commission retains jurisdiction to review the multiplexing and interworking arrangements and attribution of the costs thereof and to require such changes in the provision of these services and equipment as may be necessary.

11. IT IS FURTHER ORDERED that no Joint Applicant that is deemed a dominant carrier pursuant to the Commission's decision in CC Docket No. 85-107[2] shall either dispose of any interest in TAINO-CARIB capacity it is authorized to acquire to any entity on an ownership basis or dispose of any interest in any such capacity in any way to a non-U.S. telecommunications service provider without prior authorization of the Commission.

12. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

FOOTNOTES

[1] For a detailed description of the TAINO-CARIB cable system, *see* the Cable Landing License, SCL-92-002, DA 92-_____, adopted June ___, 1992.

[2] *See* International Carrier Policies, 102 FCC 2d 812, 822 (1985).

SCHEDULE B
27-Apr-92

VOTING INTERESTS IN THE TAINO-CARIB CABLE SYSTEM

PARTIES	PERCENT
AACR-DR (DOMINICAN REPUBLIC)	0.36102
AT&T	42.35000
BET (BARBADOS)	1.23336
C&W (BERMUDA)	9.94263
CANTV (VENEZUELA)	0.68895
CODETEL (DOMINICAN REPUBLIC)	1.75638
EMBRATEL (BRAZIL)	0.37951
FT (FRANCE)	0.95152
HAWTEL	0.11616
ITALCABLE (ITALY)	0.49360
KDD (JAPAN)	0.03959
MCII	8.24341
STSJ	0.47511
TDH (HAITI)	0.25970
TELECOM (COLUMBIA)	2.49435
TELINTAR (ARGENTINA)	0.03959
TELMEX (MEXICO)	0.27453
TLD	16.55913
TLFN (SPAIN)	0.94238
TLGB (CANADA)	2.36197
TRT/FTC	0.27453
TSTT (TRINIDAD & TOBAGO)	1.39276
USSP	7.81549
WCOM	0.55430
TOTALS	100.00000

SCHEDULE C-1
27-Apr-92

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF
SUBSEGMENTS A, B, C1, C2, C3, AND D OF THE
TAINO - CARIB CABLE SYSTEM

PARTIES	SEGMENT A PERCENT	SEGMENT B PERCENT	SUBSEGMENT C1 PERCENT	SUBSEGMENT C2 PERCENT	SUBSEGMENT C3 PERCENT	SEGMENT D PERCENT
AACR-DR	0.30864	0.00000	0.30864	0.00000	0.88496	0.88496
AT&T	72.06790	0.00000	72.06790	0.00000	23.45133	23.45133
BET	0.23148	0.00000	0.23148	0.00000	4.86726	4.86726
C&W	2.39198	1.57658	2.39198	1.57658	36.28319	36.28319
CANTV	1.00309	0.67568	1.00309	0.67568	0.00000	0.00000
CODETEL	2.54630	1.35135	2.54630	1.35135	0.44248	0.44248
EMBRATEL	0.23148	0.22523	0.23148	0.22523	0.88496	0.88496
FT	0.07716	0.00000	0.07716	0.00000	3.98230	3.98230
HAWTEL	0.00000	0.45045	0.00000	0.45045	0.00000	0.00000
ITALCABLE	0.84877	0.22523	0.84877	0.22523	0.00000	0.00000
KDD	0.07716	0.00000	0.07716	0.00000	0.00000	0.00000
MCII	9.33642	9.45946	9.33642	9.45946	4.42478	4.42478
STSJ	0.92593	0.00000	0.92593	0.00000	0.00000	0.00000
TDH	0.30864	0.00000	0.30864	0.00000	0.44248	0.44248
TELECOM	4.86111	0.00000	4.86111	0.00000	0.00000	0.00000
TELINTAR	0.07716	0.00000	0.07716	0.00000	0.00000	0.00000
TELMEX	0.30864	0.45045	0.30864	0.45045	0.00000	0.00000
TLD	0.00000	53.60360	0.00000	53.60360	11.94690	11.94690
TLFN	1.15741	1.35135	1.15741	1.35135	0.00000	0.00000
TLGB	0.84877	1.57658	0.84877	1.57658	6.63717	6.63717
TRT/FTC	0.30864	0.45045	0.30864	0.45045	0.00000	0.00000
TSTT	0.23148	0.22523	0.23148	0.22523	5.30973	5.30973
USSP	0.77160	28.37838	0.77160	28.37838	0.44248	0.44248
WCOM	1.08025	0.00000	1.08025	0.00000	0.00000	0.00000
TOTALS	100.00000	100.00000	100.00000	100.00000	100.00000	100.00000

SCHEDULE C-2
27-Apr-92

ALLOCATION OF CAPITAL, OPERATING, AND MAINTENANCE COSTS OF
SUBSEGMENTS E-1, E-2, E-3, AND E-4 OF THE
TAINO - CARIB CABLE SYSTEM

PARTIES	SUBSEGMENT E1 (PERCENT)	SUBSEGMENT E2 (PERCENT)	SUBSEGMENT E3 (PERCENT)	SUBSEGMENT E4 (PERCENT)
AACR-DR	0.30864	0.00000	0.22989	0.88496
AT&T	72.06790	0.00000	53.67816	23.45133
BET	0.23148	0.00000	0.17241	4.86726
C&W	2.39198	1.57658	2.18391	36.28319
CANTV	1.00309	0.67568	0.91954	0.00000
CODETEL	2.54630	1.35135	2.24138	0.44248
EMBRATEL	0.23148	0.22523	0.22989	0.88496
FT	0.07716	0.00000	0.05747	3.98230
HAWTEL	0.00000	0.45045	0.11494	0.00000
ITALCABLE	0.84877	0.22523	0.68966	0.00000
KDD	0.07716	0.00000	0.05747	0.00000
MCII	9.33642	9.45946	9.36782	4.42478
STSJ	0.92593	0.00000	0.68966	0.00000
TDH	0.30864	0.00000	0.22989	0.44248
TELECOM	4.86111	0.00000	3.62069	0.00000
TELINTAR	0.07716	0.00000	0.05747	0.00000
TELMEX	0.30864	0.45045	0.34483	0.00000
TLD	0.00000	53.60360	13.67816	11.94690
TLFN	1.15741	1.35135	1.20690	0.00000
TLGB	0.84877	1.57658	1.03448	6.63717
TRT/FTC	0.30864	0.45045	0.34483	0.00000
TSTT	0.23148	0.22523	0.22989	5.30973
USSP	0.77160	28.37838	7.81609	0.44248
WCOM	1.08025	0.00000	0.80460	0.00000
TOTALS	100.00000	100.00000	100.00000	100.00000

SCHEDULE D
PAGE 1 OF 4

TAINO - CARIB CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN MIRAMAR, P.R. AND THE BRANCHING UNIT

JOINTLY ASSIGNED MIUS

PARTIES	AACR-DR	AT&T	BET	CODETEL	EMBRATEL	TDH	TELECOM	TELINTAR	TSTT	TOTAL
AT&T	0	0	3	7	2	0	16	1	3	32
C&W	0	30	0	1	0	0	0	0	0	31
CANTV	0	0	0	3	0	0	6	0	0	9
CODETEL	0	0	0	0	1	0	0	0	0	1
FT	0	0	0	0	0	1	0	0	0	1
ITALCABLE	0	3	0	1	0	0	5	0	0	9
KDD	0	0	0	0	0	0	1	0	0	1
MCII	0	0	0	6	0	2	17	0	0	25
TELMEX	0	0	0	1	0	0	3	0	0	4
TLFN	0	3	0	3	0	0	5	0	0	11
TLGB	2	2	0	0	0	1	2	0	0	7
TRT/FTC	0	0	0	0	0	0	2	0	0	2
USSP	0	0	[illegible]	4	0	0	6	0	0	10
TOTALS	2	38	3	26	3	4	63	1	3	143

WHOLLY ASSIGNED MIUS

PARTIES	
AACR-DR	1
AT&T	432
CANTV	2
CODETEL	3
ITALCABLE	1
MCII	46
STSJ	6
TLFN	2
TLGB	2
TRT/FTC	1
WCOM	7
SUBTOTAL	505

TOTAL 648

(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MIU 1/2 INTERESTS
AACR-DR	2	1	4
AT&T	70	432	934
BET	3	0	3
C&W	31	0	31
CANTV	9	2	13
CODETEL	27	3	33
EMBRATEL	3	0	3
FT	1	0	1
ITALCABLE	9	1	11
KDD	1	0	1
MCII	25	48	121
STSJ	0	6	12
TDH	4	0	4
TELECOM	63	0	63
TELINTAR	1	0	1
TELMEX	4	0	4
TLFN	11	2	15
TLGB	7	2	11
TRT/FTC	2	1	4
TSTT	3	0	3
USSP	10	0	10
WCOM	0	7	14
TOTAL	286	505	1296

TAINO – CARIB CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN ISLA VERDE PR. AND THE BRANCHING UNIT

JOINTLY ASSIGNED MIUS

PARTIES	CANTV	EMBRATEL	TLD	TSTT	TOTAL
C&W	0	0	7	0	7
HAWTEL	0	0	2	0	2
ITALCABLE	0	0	1	0	1
TELMEX	0	0	2	0	2
TLD	3	1	0	1	5
TLFN	0	0	6	0	6
TLGB	0	0	3	0	3
USSP	0	0	0	0	0
TOTALS	3	1	21	1	26

WHOLLY ASSIGNED MIUS

PARTIES	
CODETEL	3
MCII	21
TLD	106
TLGB	2
TRT	1
USSP	63
TOTAL	196

TOTAL 222
(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MIU 1/2 INTERESTS
C&W	7	0	7
CANTV	3	0	3
CODETEL	0	3	6
EMBRATEL	1	0	1
HAWTEL	2	0	2
ITALCABLE	1	0	1
MCII	0	21	42
TELMEX	2	0	2
TLD	26	106	238
TLFN	6	0	6
TLGB	3	2	7
TRT/FTC	0	1	2
TSTT	1	0	1
USSP	0	63	126
TOTAL	52	196	444

SCHEDULE D
PAGE 3 OF 4

TAINO - CARIB CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN THE BRANCHING UNIT AND ST. THOMAS

JOINTLY ASSIGNED MIUS

PARTIES	BET	C&W	CANTV	CODETEL	EMBRATEL	ITALCABLE	TDH	TELECOM	TELINTAR	TLD	TLFN	TLGB	TSTT	TOTAL
AACR-DR	0	0	0	0	0	0	0	0	0	0	0	2	0	2
AT&T	3	30	0	7	2	3	0	18	1	0	3	2	3	70
CODETEL	0	1	3	0	1	1	0	0	0	0	3	0	0	9
FT	0	0	0	0	0	0	1	0	0	0	0	0	0	1
HAWTEL	0	0	0	0	0	0	0	0	0	2	0	0	0	2
KDD	0	0	0	0	0	0	0	1	0	0	0	0	0	1
MCII	0	0	0	6	0	0	2	17	0	0	0	0	0	25
TELECOM	0	0	6	0	0	5	0	0	0	0	5	0	0	16
TELMEX	0	0	0	1	0	0	0	3	0	2	0	0	0	6
TLD	0	7	3	0	1	1	0	0	0	0	0	6	3	1	22
TLGB	0	0	0	0	0	0	1	2	0	0	0	0	0	3
TRT/FTC	0	0	0	0	0	0	0	2	0	0	0	0	0	2
USSP	0	0	0	4	0	0	0	6	0	0	0	0	0	10
TOTALS	3	38	12	18	4	10	4	47	1	4	17	7	4	169

WHOLLY ASSIGNED MIUS

PARTIES	
AACR-DR	1
AT&T	432
CANTV	2
CODETEL	6
ITALCABLE	1
MCII	69
STSJ	6
TLD	108
TLFN	2
TLGB	4
TRT/FTC	2
USSP	63
WCOM	7
SUBTOTAL	701

TOTAL	870
(# OF WHOLE MIUS)	

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MIU 1/2 INTERESTS
AACR-DR	2	1	4
AT&T	70	432	934
BET	3	0	3
C&W	38	0	38
CANTV	12	2	16
CODETEL	27	6	36
EMBRATEL	4	0	4
FT	1	0	1
HAWTEL	2	0	2
ITALCABLE	10	1	12
KDD	1	0	1
MCII	25	69	163
STSJ	0	6	12
TDH	4	0	4
TELECOM	63	0	63
TELINTAR	1	0	1
TELMEX	6	0	6
TLD	26	108	239
TLFN	17	2	21
TLGB	10	4	18
TRT/FTC	2	2	6
TSTT	4	0	4
USSP	10	63	136
WCOM	0	7	14
TOTAL	338	701	1740

TAINO – CARIB CABLE SYSTEM
MIUS ASSIGNED FOR USE BY THE PARTIES TO THIS AGREEMENT
BETWEEN ST. THOMAS VI. AND TORTOLA

JOINTLY ASSIGNED MIUS

PARTIES	BET	C&W	FT	TSTT	TOTAL
AT&T	7	41	3	2	53
CODETEL	0	1	0	0	1
MCII	2	8	0	0	10
TDH	0	0	1	0	1
TLD	0	7	0	0	7
TLGB	2	4	1	0	7
USSP	0	1	0	0	1
TOTALS	11	62	5	2	80

WHOLLY ASSIGNED MIUS

PARTIES	
AACR-DR	1
C&W	10
EMBRATEL	1
FT	2
TLD	10
TLGB	4
TSTT	5
SUBTOTAL	33

TOTAL	113

(# OF WHOLE MIUS)

SUMMARY

PARTIES	JOINTLY ASSIGNED	SOLELY ASSIGNED	MIU 1/2 INTERESTS
AACR-DR	0	1	2
AT&T	53	0	53
BET	11	0	11
C&W	62	10	82
CODETEL	1	0	1
EMBRATEL	0	1	2
FT	5	2	9
MCII	10	0	10
TDH	1	0	1
TLD	7	10	27
TLGB	7	4	15
TSTT	2	5	12
USSP	1	0	1
TOTAL	160	33	226

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA
DE PUERTO RICO

US SPRINT COMMUNICATIONS COMPANY
LIMITED PARTNERSHIP

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY

MCI File No. SCL-92-002
INTERNATIONAL, INC.

ST. THOMAS AND
SAN JUAN TELEPHONE
COMPANY, INC.

TRT/FTC
COMMUNICATIONS, INC.

GTE HAWAIIAN
TELEPHONE COMPANY
INCORPORATED

WORLD COMMUNICATIONS, INC.

Join Application for a License to land and operate the TAINO-CARIB fiber optic submarine cable system extending between Puerto Rico and St. Thomas in the U.S. Virgin Islands and the British Virgin Islands

CABLE LANDING LICENSE

Adopted: June 25, 1992; Released: July 6, 1992

By the Chief, Common Carrier Bureau:

1. The Commission has before it for consideration a joint application filed by the above-captioned applicants (hereinafter collectively referred to as "Joint Applicants"), pursuant to the provisions of 47 U.S.C. §§34-39, for a license to land and operate in United States territory a fiber optic submarine telecommunications cable (TAINO-CARIB) extending between Puerto Rico, St. Thomas in the U.S. Virgin Islands, and Tortola in the British Virgin Islands. The application was placed on public notice on February 19, 1992. No comments were received.

2. The TAINO-CARIB cable will land at cable stations in Puerto Rico at Miramar and at Isla Verde (approximately two miles east of Miramar). From these cable stations, underwater segments will connect at a branching unit off the San Juan coast. From the branching unit, the TAINO-CARIB cable will extend to a cable station at Magens Bay, St. Thomas in the U.S. Virgin Islands. From St. Thomas, the TAINO-CARIB will extend to the British Virgin Islands where it will land at the Tortola Brewers Bay cable landing and extend to the existing Chalwell cable station. The proposed cable system will be owned by the Joint Applicants and a number of foreign telecommunications entities; it has a ready for service (RFS) date of October 1992.

3. The transmission portion of the TAINO-CARIB system will consist of six fiber pairs between Puerto Rico and St. Thomas and six fiber pairs between St. Thomas and Tortola, with each pair operating at a speed of 560 Mbps. The TAINO-CARIB cable will have a design capacity equivalent to 45,360 64-Kbps circuits. Because of the relatively short distances involved, the TAINO-CARIB cable will employ repeaterless technology, the first time this technology has been used in the Caribbean Basin. Use of repeaterless technology will give the owners a high degree of flexibility in terms of operating all or portions of the capacity as needed to meet service demands. The total cost of the transmission portion of the TAINO-CARIB cable, including cable stations, is estimated to be $15,436,230.

4. The TAINO-CARIB cable system will provide the "missing link" in Caribbean telecommunications as there is no cable link between Puerto Rico, St. Thomas and Tortola. In Tortola, the TAINO-CARIB cable will provide connectivity with the CARAC fiber optic submarine cable, which connects Tortola to Bermuda, and the Private Trans Atlantic Cable System (PTAT) which interconnects Bermuda with both the U.S. mainland and Europe (Ireland and England). In Puerto Rico, the TAINO-CARIB cable will interconnect with the TCS-1 fiber optic submarine cable system which connects West Palm Beach, Florida with San Juan and continues onward to the Dominican Republic, Jamaica and Colombia on the South American mainland. At St. Thomas, there are numerous analog cable systems which extend to the U.S. Mainland and other Caribbean island and South American locations. The Joint applicants note that when these older systems are replaced by state-of-the-art fiber optic cable systems, the presence of TAINO-CARIB will facilitate interconnection with future digital cables.

5. By letter dated May 7, 1992, the State Department informed the Commission that it has no objection to the application to land in U.S. territory and operate the TAINO-CARIB cable system. In light of the State Department's letter and the Commission's finding in the related Section 214 application to construct and operate the TAINO-CARIB system (File No. I-T-C-92-106), we find that a grant of a cable landing license for the TAINO-CARIB cable will serve the public interest.

6. In light of the above considerations, the Commission hereby GRANTS AND ISSUES, under the provisions of "An Act Relating to the Landing and Operation of Submarine Cables in the United States", 47 U.S.C. §§34-39, and pursuant to the authority delegated to this Commission under Executive Order No. 10530, dated May 10, 1954, 3 C.F.R. 1954-1958 Comp., p. 189 (1961), *reprinted in* 3 U.S.C.A. §301 at p. 1052 (1985), to the Joint Applicants herein a license to land and operate the above described TAINO-CARIB cable system, having the capacity specified in paragraph 3, *supra*. This license is subject to: (a) the Communications Act of 1934, as amended, 47 U.S.C. §§151-609; (b) subsequent applicable acts; (c) all relevant

rules and regulations of the Federal Communications Commission made pursuant to authority vested in it; (d) any treaties or conventions relating to communications to which the United States of America is or may hereafter become a party; (e) any action by the Commission or the Congress of the United States of America rescinding, changing, modifying or amending any rights accruing to any person hereunder; and (f) the following conditions:

(1) The location of the cable within the territorial waters of the United States of America, its territories and possessions, and upon the foreshore thereof, shall be in conformity with plans approved by the Secretary of the Army, and the cable shall be moved or shifted by the Licensees at their expense upon the request of the Secretary of the Army whenever he or she considers such course necessary in the public interest, for reasons of national defense, or for the maintenance or improvement of harbors for navigational purposes;

(2) The Licensees shall at all times comply with any requirements of United States Government authorities regarding the location and concealment of the cable facilities, buildings, and apparatus with a view to protecting and safeguarding the cable from injury or destruction by enemies of the United States of America;

(3) The Licensees or any persons or companies controlling them or controlled by them do not enjoy and shall not acquire any right, for the purpose of handling traffic to or from the United States, its territories or possessions, to land, connect or operate cables or landlines, to construct or operate radio stations, or to interchange traffic, which is denied to any other United States company by reason of any concession, contract, understanding, or working arrangement to which the Licensees or any persons or companies controlling them or controlled by them are parties;

(4) Neither this license, nor the rights granted herein, shall be transferred, assigned, or in any manner either voluntarily or involuntarily disposed of or disposed of indirectly by transfer of control of the Licensees to any persons, unless the Federal Communications Commission shall give prior consent in writing;

(5) This license is revocable after due notice and opportunity for hearing by the Federal Communications Commission in the event of breach or nonfulfillment of any requirements specified in Section 2 of "An Act Relating to the Landing and Operation of Submarine Cables in the United States," 47 U.S.C. §§34-39, or for failure to comply with the terms of the authorization;

(6) The Licensees shall notify the Commission in writing of the date on which the cable is placed in service; and this license shall expire 25 years from that date, unless renewed or extended upon proper applications duly filed no less than six months prior to the expiration date; and, upon expiration of the license, all rights granted under it shall be terminated; and

(7) The terms and conditions upon which this license is given shall be accepted by the Licensees by filing a letter with the Secretary, Federal Communications Commission, Washington, D.C. 20554, within 30 days of the release of this order.

7. This order is issued under Section 0.291 of the Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ALPHA LYRACOM, d/b/a PAN AMERICAN SATELLITE — File No. CSS-91-006

Application for Authority to Construct, Launch and Operate a Hybrid International Communications Satellite System (PAS-7)

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: June 19, 1992; Released: July 6, 1992

By the Commission:

I. INTRODUCTION

1. Alpha Lyracom, d/b/a Pan American Satellite ("PAS") has filed the above-captioned application for authority to construct, launch, and operate a new hybrid satellite, "PAS-7," as part of its separate international communications satellite system. We placed the application on public notice on December 12, 1990.[1] McCaw Space Technologies, Inc. ("McCaw") has filed comments[2] requesting that the Commission condition authorization of PAS-7 on the completion of technical coordination with McCaw that precludes the possibility of harmful interference with McCaw's conditionally authorized separate international system two degrees away.[3] For the reasons set forth below, we grant PAS conditional authority to construct, launch and operate PAS-7.

II. BACKGROUND

2. PAS currently operates a hybrid spacecraft -- which transmits on both C-band and Ku-band frequencies -- in the Atlantic Ocean Region (AOR) at the 45 degrees West Longitude (W.L.) orbital location. The PAS-1 spacecraft is authorized to provide, *inter alia*, various data and video services between the U.S. and Latin America and between the U.S. and Europe.[4] PAS also is conditionally authorized to construct a second spacecraft, PAS-2, to serve the AOR.[5] On August 29, 1991, the Commission granted PAS conditional authority to construct, launch and operate a third satellite, PAS-4, in the Pacific Ocean Region ("POR"),[6] and we recently granted PAS such authority for a satellite proposed to be located at 68 degrees E.L., to serve the Indian Ocean Region (IOR).[7] PAS proposes in the instant application a second hybrid satellite to serve the Indian Ocean Region at 72 degrees E.L.

3. According to PAS' application, PAS-7 would be a high-power, state-of-the-art satellite capable of full frequency reuse at both C-band and Ku-band. PAS-7 would be capable of operating forty transponders simultaneously, twenty-four transponders at C-band and sixteen at Ku-band.[8] Both frequency bands would be used to provide international service between points as far east as Japan and as far west as Western Europe. PAS also states that in conjunction with its satellite networks that are or will be operating in the AOR and the POR, the operation of PAS-7 will allow PAS to offer world-wide interconnected service through its system. PAS also proposes to offer a variety of non-United States domestic communications services in Asian, African and European countries. PAS states that PAS-7 is at least 2 degrees apart from all but one satellite in the vicinity,[9] that its proposal for PAS-7 is consistent with the Commission's full-frequency reuse policies, and that it is unlikely PAS-7 would either cause or suffer objectionable interference to or from any other satellite. PAS projects an in-service date of December 1997.

III. DISCUSSION

A. Licensing Policies

4. In its *Separate Systems* decision,[10] the Commission established certain criteria for considering applications for international satellite systems separate from INTELSAT. In reviewing an application for a separate international system, the Commission determines whether the applicant possesses the requisite legal, financial and technical qualifications, whether the proposal is otherwise consistent with the *Separate Systems* decision, and whether grant of the request would be in the public interest. We will issue a conditional authorization to an applicant that satisfies these standards. Final construction, launch and operating authority, however, is contingent upon fulfillment of certain financial requirements and of U.S. obligations under Article XIV(d) of the INTELSAT Agreement.

5. *Legal Qualifications*. The Commission has already found that PAS possesses the necessary legal qualifications to be a Commission licensee.[11] PAS proposes no substantial change in ownership or control of its separate system. We therefore find PAS legally qualified under Title III of the Communications Act to provide international satellite services via PAS-7.

6. *Financial Qualifications*. We find that PAS satisfies the first stage of the two-stage financial showing established by the Commission in the *Separate Systems* decision. The first stage criteria include a demonstration of: (1) the estimated costs of proposed construction and launch, and any other initial expenses for the proposed space station(s); (2) the estimated operating expenses for one year after launch of the proposed space station(s): and (3) the source(s) or potential source(s) of funding for the proposed system for one year, which might include the identity of financiers and their letters of financial interest.[12]

7. PAS estimates that the aggregate cost for the construction, launch and first-year operation of PAS-7 will total approximately $164 million. PAS attaches to its application a letter from Donaldson, Lufkin & Jenrette ("DLJ"), an international investment banking and securities firm that states it is working with PAS to raise the necessary funds. DLJ anticipates that, while the precise terms of any financing would be subject to market conditions, as well as PAS' realization of its own objectives, there would be a number of potential investors who would seriously consider an equity and/or debt investment.

8. We find that PAS' financial showing satisfies our first stage criteria. The authorization that we are issuing here is conditioned on PAS' subsequent submission of the second

stage financial information required under the *Separate Systems* decision.[13] Except as otherwise authorized by the Commission, PAS may not expend funds for the construction of its proposed system until it demonstrates sufficient non-contingent funds to meet the construction, launch and first-year operational costs it projects for PAS-7.

9. PAS must make its second stage financial showing no later than 60 days following the State Department's notification to the Commission that the United States has fulfilled its Article XIV(d) obligations and that the Commission may proceed with final authorization of the proposed system.[14] Provided PAS meets our second stage financial requirements, the Commission will at that time issue PAS final authority to construct, launch and operate PAS-7. However, if PAS can satisfy our financial requirements prior to receipt of the State Department's notification, we will issue PAS final construction authority. PAS would in that event bear all risks and liabilities in commencing construction of its satellite pending final Commission issuance of launch authority and a license to begin operating. If the conditions of the second stage financial showing are not timely satisfied, the conditional authorization will become null and void, and the orbital location temporarily assigned to PAS will become available for reassignment.

10. *Technical Qualifications*. We find that PAS satisfies the technical requirements of the *Separate Systems* decision.[15] PAS' engineering statement demonstrates adequate reuse of the spectrum at both C-band and Ku-band frequencies. The spacecraft is capable of operating in a manner consistent with Commission rules and the International Radio Regulations. The technical proposal for PAS-7 also is consistent with the Commission's 2 degree spacing policy,[16] as required under *Separate Systems*. While it is apparent that under certain conditions PAS-7 may cause harmful interference to McCaw's proposed Celestar spacecraft at 70 degrees E.L.,[17] we will not explicitly condition this authorization on the completion of technical coordination with McCaw.

11. The technical proposal for PAS-7 does not appear to require our involvement by further conditioning PAS' authorization at this time.[18] We believe that coordination can be accomplished through the cooperative efforts of PAS and McCaw.[19] The Commission has stated on numerous occasions in the context of both international and domestic fixed-satellite service that we expect U.S.-authorized satellite operators to resolve potential interference problems between themselves because they can best weigh the technical and economic tradeoffs involved in negotiating a coordination agreement. The Commission does not become involved in negotiating between U.S. applicants unless the parties are unable to reach an agreement.[20] The Commission will intervene in the event the parties demonstrate that a coordination agreement cannot be reached after exhaustive good faith efforts.

12. *Orbit Assignment Policies*. PAS recognizes in its application that, in order to be granted, the PAS-7 proposal must fit within the exception to the Commission's rule on orbit assignments. As a general rule, the Commission will permit an entity initially to apply only for two orbital positions in a given band for an international separate system. The Commission will not assign any additional orbital positions to an operator for international "expansion" satellites until there is a showing that in-orbit satellites are essentially filled and that an additional orbit location is needed to satisfy firm customer growth requirements, including reasonable protection requirements.[21] However, as PAS notes, the Commission established an exception to the general rule to cover situations where an applicant proposes to provide international service "to more than one region of the world, and where those regions are so widely separated that more than one satellite must be used to provide the proposed service."[22] We grant the PAS-7 application pursuant to this exception. In conjunction with its PAS-6 spacecraft, PAS proposes to serve a region that is not, and would not be, served by its other authorized or conditionally authorized satellites. We believe that the public interest in competitive international satellite services will be well served by authorizing PAS to extend service to this growing region.

13. *Public Interest Benefits*. As discussed directly above, we believe that PAS' proposed expansion into the IOR, and the resulting worldwide interconnection capability, will provide substantial benefits to users of international satellite communications services. We are hopeful that grant of PAS' application will provide the user benefits contemplated by the Commission in the *Separate Systems* decision, in particular: the stimulation of technological innovation and service development; new means of packaging and transmitting information over satellites; improved network efficiencies; reduced user costs; and the creation of new business and trade opportunities through improved international communications.[23] Given these important public interest benefits, we will issue a conditional authorization to PAS and temporarily assign PAS-7 to the 72 degrees E.L. location.

IV. CONCLUSION

14. We find that PAS is legally, financially, and technically qualified, under Title III of the Communications Act, and the *Separate Systems* decision, to hold a conditional authorization to construct, launch and operate its proposed international satellite system. We also find that conditional grant of its application is consistent with our orbit assignment policies and would serve the public interest, convenience and necessity under Section 309(a).

15. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i) and (j), 308, 309 and 319 of the Communications Act, as amended, 47 U.S.C. Sections 4(i) and (j), 308, 309 and 319, the application of PAS to construct, launch and operate a hybrid international communications satellite system, File No. CSS-91-006, IS GRANTED, subject to the terms and conditions of this conditional authorization, the technical specifications set forth in its application, and the formal instruments of authorization to be issued at a later date.

16. IT IS FURTHER ORDERED that final authorization for both launch and operation of this satellite shall not be issued unless and until: (1) one or more foreign authorities authorize use of this system and enter into consultation procedures with the United States Party or Signatory under Article XIV(d) of the INTELSAT Agreement to ensure technical compatibility and to avoid significant economic harm; and (2) the Department of State informs the Commission that the United States has completed its Article XIV(d) obligations and that the Commission may proceed with final authorization of the proposed system.

17. IT IS FURTHER ORDERED that PAS shall not begin construction of its hybrid separate system until it has provided the Commission with a demonstration of its cur-

rent financial ability to meet the costs of construction and launch as well as operating expenses for one year following launch. PAS shall file this information with the Commission no later than 60 days after the Department of State notifies the Commission that the United States has completed its Article XIV(d) obligations with respect to the proposed system and that we may proceed with final authorization of the system. Should these conditions not be timely satisfied upon the expiration of the sixty-day period following receipt of the State Department's notification, unless extended by the Commission for good cause shown, this conditional authorization shall become null and void.

18. IT IS FURTHER ORDERED that, pursuant to 47 C.F.R. Section 25.111(b), final authorization to construct, launch and operate PAS-7 may be subject to any additional terms and conditions required to effect coordination of the frequency assignments with satellites of foreign administrations pursuant to Article 11 of the international Radio Regulations.

19. IT IS FURTHER ORDERED that as a condition of this order PAS must file with the Commission copies of any operating agreements it enters into, within thirty days of their execution.

20. IT IS FURTHER ORDERED that PAS may provide through the sale or lease of transponders or space segment capacity: (1) all services not interconnected with the public switched network (including private line services and video and audio transmission services); (2) emergency restoration services; (3) up to 100 64-kilobit-per-second equivalent circuits interconnected with the public switched networks for the provision of switched international telecommunications services; and (4) interconnected private line circuits.[24]

21. IT IS FURTHER ORDERED that the Commission will retain jurisdiction over the use of all space segment within the proposed system to ensure compliance with the service restrictions stated above.

22. IT IS FURTHER ORDERED that PAS is temporarily assigned the orbital location at 72 degrees east longitude for operation of its proposed IOR satellite.

23. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to PAS does not confer any permanent right to the use of the orbit or spectrum and that the assignment is subject to change by summary order of the Commission on thirty days notice. Such a change may be ordered if the national security or the public interest requires it, or if any of the objectives or policies set forth in the Report and Order in the *Separate Systems* decision requires it. Neither this authorization nor any right granted by this authorization, will be transferred, assigned or disposed of in any manner, voluntarily or involuntarily. It must not be assigned by transfer of control of any corporation holding this authorization. It must not be transferred to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served.

24. IT IS FURTHER ORDERED that PAS shall file with the Commission no later than one year from the release date of this conditional authorization information showing that it is making all reasonable efforts toward obtaining foreign approval to provide services via its proposed system.

25. IT IS FURTHER ORDERED that PAS must comply with the Report and Order adopted in the *Separate Systems* decision, CC Docket No. 84-1299, 101 FCC 2d 1046 (1985), as amended in the reconsideration orders, FCC 86-144 (released April 17, 1986) and FCC 86-471 (released October 31, 1986), 1 FCC Rcd 439 (1986), with FCC 92-95 (released April 8, 1992), 7 FCC Rcd 2313 (1992), and with any superseding orders.

26. IT IS FURTHER ORDERED that this Memorandum Opinion, Order and Authorization is effective upon adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See Public Notice*, Report No. I-6522, released December 12, 1990.

[2] McCaw filed its comments on January 11, 1991. PAS filed a letter in response to McCaw's comments on January 24, 1991. McCaw filed a reply to PAS' letter on February 5, 1991, and PAS responded on March 1, 1991.

[3] *See McCaw Space Technologies, Inc.*, 2 FCC Rcd 259 (1987). McCaw has been granted conditional authorization to construct, launch and operate separate international satellites at 70 degrees East Longitude (E.L.) and 170 degrees E.L.

[4] *Pan American Satellite*, 2 FCC Rcd 7011 (1987) (final authorization to operate C-band transponders); 3 FCC Rcd 6474 (Com. Car. Bur. 1988) (final authorization to operate Ku-band transponders). *See also Pan American Satellite*, 4 FCC Rcd 5751 (Int'l Fac. Div. 1989); 4 FCC Rcd 8649 (Int'l Fac. Div. 1989). *See generally* File No. CSS-84-004-P(LA).

[5] *See Pan American Satellite Corporation*, 101 FCC 2d 1318 (1985) (initial conditional authorization for C-band and K-band frequencies at 57 degrees W.L.); 2 FCC Rcd 441 (Com. Car. Bur. 1987) (authorization to acquire control of Cygnus Satellite Corporation); 3 FCC Rcd 677 (1988) (directive to clarify plans for second spacecraft in light of Commission's orbit assignment policies and PAS' acquisition of Cygnus Ku-band authorizations at 43 and 45 degrees W.L.). PAS has filed an application to modify the conditional construction permit for PAS-2. PAS proposes to locate PAS-2 at 43 degrees W.L. and to transmit on C-band and Ku-band frequencies. *See* File No. CSS-88-003(M).

[6] *Pan American Satellite*, 6 FCC Rcd 5132 (1991).

[7] *Pan American Satellite*, 7 FCC Rcd 2974 (1992).

[8] At C-band PAS-7 will be able to transmit and receive at frequency ranges of 3.7-4.2 GHz and 5.925-6.425 GHz, respectively. At Ku-band PAS-7 will downlink in the 11.45-11.7 and 12.5-12.75 GHz frequency ranges and uplink in the 14.0-14.5 GHz frequency range.

[9] PAS notes that Turkey has advanced published with the International Frequency Registration Board (IFRB) to place a Ku-band satellite at 73.5 degrees E.L. PAS states that, pursuant to IFRB procedures, it intends to coordinate, through the U.S. government, with Turkey to resolve all relevant issues, and it foresees reaching an agreement before PAS-7's anticipated launch date.

[10] Establishment of Satellite Systems Providing International Communications (*Separate Systems*), 101 FCC 2d 1046 (1985), *on recon.*, 61 RR 2d 649 (1986), *further recon.*, 1 FCC Rcd 439 (1986).

[11] *See* decisions cited *supra* notes 4, 5, 6 and 7.

[12] *See Separate Systems*, 101 FCC 2d at 1165.

[13] *See id.* at 1165-66. *See also Orion Satellite Corporation*, 5 FCC Rcd 4937 (1990); 6 FCC Rcd 4201 (1991).

[14] *Separate Systems*, 101 FCC 2d at 1166. Upon reconsideration of the *Separate Systems* decision, 61 RR 2d at 666, the Commission set a one-year limit, from the date of conditional authorization, for applicant submission of the second stage financial showing. The Commission noted, however, that an applicant might extend its authorization beyond the one-year limit through a good faith showing of diligence in seeking to establish its proposed system. *Id.*

[15] *See Separate Systems*, 101 FCC 2d at 1166-73.

[16] *See generally Licensing of Space Stations in the Domestic Fixed-*Satellite *Service*, 54 RR 2d 577 (1983) (*Reduced Orbital Spacing).*

[17] In response to a staff request, PAS submitted a study investigating the interference effects of PAS-4 on McCaw's proposed POR Celestar spacecraft two degrees away. This study is illustrative of the potential interference between PAS-7 and McCaw's proposed IOR spacecraft.

[18] We note, however, the obligation of the United States to coordinate the operation of PAS-7 with foreign administrations under Article 11 of the international Radio Regulations. PAS states that it is already working to resolve potential conflicts with a proposed spacecraft at 73.5 degrees E.L. Pursuant to Section 25 of the Commission's rules, we may impose on PAS' final authorizations to construct, launch and operate its international satellite systems any additional terms and conditions as required to effect coordination of the frequency assignments with other administrations. *See* 47 C.F.R. Section 25.111 (b).

[19] *See Pan American Satellite Corporation*, 6 FCC Rcd at 5133.

[20] *Pan American Satellite Corporation*, 6 FCC Rcd at 5133; *Orion Satellite Corporation*, 5 FCC Rcd at 4938-39; *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 5 FCC Rcd 179, 183 (1990) (citing *GE American Communications, Inc.*, 3 FCC Rcd 6871 (1988) at para. 2; *Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service*, 50 Fed. Reg. 35228 (1985) (1985 *Assignment Order)* at para. 19).

[21] *Separate Systems*, 101 FCC 2d at 1174.

[22] *Id.* In such a case the Commission will allow an applicant to show that it should be initially allowed to build and operate the system. *Id.*

[23] *See* id. at 1177.

[24] *See* Permissible Services of U.S. licensed International Communications Satellite Systems Separate from the International Telecommunications Satellite Organization (INTELSAT), 7 FCC Rcd 2313 (1992), 57 Fed. Reg. 14,798 (1992). Provision of private line circuits interconnected with the public switched network is contingent upon fulfillment of U.S. obligations under Article XIV(d) of the INTELSAT Agreement and the grant of final authority by the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-433

In re Applications of

GARY SELLERS File No. BPH-891215ML

B&G BROADCASTING, INC. File No. BPH-891220MH

RAY EDMUND PRESTON, II File No. BPH-891220MI

For Construction Permit for
New FM Station, Channel 234C3,
Paintsville, Kentucky

ORDER

Adopted: June 29, 1992; Released: July 7, 1992

By the Review Board: ESBENSEN and GREENE. Board Member BLUMENTHAL absent.

1. Applicant Gary Sellers has failed to file Exceptions to the *Initial Decision*, 7 FCC Rcd 2472 (ALJ, released April 21, 1992), in the captioned proceeding. His application will thus be dismissed for failure to prosecute pursuant to 47 CFR § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED, That the application of Gary Sellers (File No. BPH-891215ML) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re Applications of

Michelle Elaine Hulse, et al., d/b/a HULSE, HORN, METZGER & WOOKEY, G.P.	File No. BPH-890526MG
BEN L. UMBERGER	File No. BPH-890530MI
GEYER BROADCASTING, CO., INC.	File No. BPH-890530MJ

For Construction Permit for
New FM Station, Channel 228A,
Chandler, Indiana

ORDER

Adopted: June 29, 1992; Released: July 7, 1992

By the Review Board: ESBENSEN and GREENE. Board Member BLUMENTHAL absent.

1. Applicant Geyer Broadcasting Co., Inc., has failed to file Exceptions to the *Initial Decision*, 7 FCC Rcd 1954 (ALJ, released March 18, 1992), in the captioned proceeding. Thus, its application will be dismissed for failure to prosecute pursuant to 47 CFR § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED, That the application of Geyer Broadcasting Co., Inc. (File No. BPH-890530MJ) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-344

In re Applications of

JULIA A. MOORE File No. BPH-880816MX

WILLIAM L. CARROLL File No. BPH-880816OA

Michael A. McMurray & Marilyn A. McMurray, A General Partnership d/b/a McMURRAY COMMUNICATIONS File No. BPH-880816OI

For Construction Permit for
New FM Station, Channel 247A,
Lebanon, Ohio

ORDER

Adopted: June 29, 1992; Released: July 7, 1992

By the Review Board: MARINO (Chairman), ESBENSEN, and GREENE.

1. Applicant Julia A. Moore has not filed Exceptions to the *Initial Decision*, 7 FCC Rcd 1459 (ALJ, released February 19, 1992), in the captioned proceeding. Her application will thus be dismissed for failure to prosecute pursuant to 47 CFR § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED, That the application of Julia A. Moore (File No. BPH-880816MX) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Eric T. Esbensen
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-79

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Eliminate
Separate Licensing of End Users
of Specialized Mobile Radio Systems

ORDER EXTENDING REPLY COMMENT PERIOD

Adopted: June 25, 1992; Released: June 25, 1992

By the Chief, Land Mobile and Microwave Division:

1. On May 5, 1992, the Commission released a Notice of Proposed Rule Making, 7 FCC Rcd 2885 (1992), (Notice), in this proceeding. The specified deadlines for comments and reply comments were June 11, 1992 and June 26, 1992, respectively.

2. On June 24, 1992, the American Petroleum Institute (API) filed a Motion for Extension of Time to file reply comments in this proceeding. API states as its reason for this request that the comments filed were not reflected in the Commission's docket files in a timely manner. Specifically, a computer search of the docket file for API on June 17, 1992 revealed only seven of the twelve comments that actually had been timely filed with the Commission's Secretary. Therefore, in order to give API and all other interested parties sufficient time to file reply comments and provide the Commission with a more complete record in this proceeding, we conclude that an extension of the reply comment deadline is in the public interest. Accordingly, IT IS ORDERED, based on the authority in Section 0.331 of the Commission's Rules and Regulations, 47 C.F.R. §0.331. that the deadline for filing reply comments in the subject Notice is extended to July 6, 1992.

FEDERAL COMMUNICATIONS COMMISSION

Richard J. Shiben
Chief, Land Mobile and Microwave Division
Private Radio Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board	**CC Docket No. 80-286**
Establishment of a Program to Monitor the Impact of Joint Board Decisions	**CC Docket No. 87-339**

RECOMMENDED DECISION AND ORDER

Adopted: June 9, 1992; Released: July 8, 1992

By the Federal-State Joint Board:

I. INTRODUCTION

1. In 1987, this Joint Board recommended a program to monitor the impact of Commission decisions to increase subscriber line charges, expand the federal lifeline assistance programs, retarget the formula for high cost assistance, and modify the common line pooling system.[1] The Commission adopted those recommendations and established a monitoring program.[2] This program established a series of Monitoring Reports to Congress to publish information in eight categories: (1) subscribership and penetration levels; (2) lifeline assistance plans; (3) costs and high cost assistance; (4) network usage and growth; (5) rates and revenues; (6) bypass; (7) pooling and rate deaveraging; and (8) jurisdictional shifts in revenue requirements. The section of the reports on jurisdictional shifts in revenue requirements was discontinued in 1990.[3]

2. On July 25, 1991, the Chief of the Common Carrier Bureau issued a Request for Comments[4] on a proposal developed by the staff of this Joint Board to modify and extend the monitoring program. That request noted that the information underlying and contained in the Monitoring Reports has not revealed any harmful effects of the Commission decisions adopted pursuant to the recommendations of this Joint Board. Nevertheless, the request proposed continuing the reports because they have proven to be a valuable source of information. In brief, the request proposed to continue to release two reports per year through 1997, to introduce two new sections containing financial and infrastructure data, and to eliminate the bypass section.

3. Because we believe that the reports contain useful information and that some of the Commission decisions bear continued monitoring, we recommend that the Commission continue the monitoring program essentially as outlined in the Request for Comments. We recommend, however, that the frequency of the reports be reduced to once a year, with the report being released in May. We recommend that the staff have the flexibility to change the content of the reports, should the need arise to monitor possible future regulatory changes.

II. SUMMARY OF COMMENTS

4. In response to the Request for Comments, 14 parties filed comments and 4 parties filed reply comments. Parties filing comments were the Ameritech Operating Companies (Ameritech), the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), the Public Service Commission of the District of Columbia (DC), GTE Service Corporation (GTE), the Iowa Utilities Board (Iowa), MCI Telecommunications Corporation (MCI), Metropolitan Fiber Systems, Inc. (MFS), the NYNEX Telephone Companies (NYNEX), Pacific Bell and Nevada Bell (Pacific), Southwestern Bell Telephone Company (Southwestern), the United States Telephone Association (USTA), and US West Communications, Inc. (US West). Parties filing reply comments were Ameritech, MCI, MFS, and USTA.

5. Most parties express support for the continuation of the monitoring program. DC notes that the monitoring program has helped it in its telecommunications regulatory and policy work. MCI says the information in the reports is essential to track impacts stemming from the outcomes of other proceedings, such as interconnection (CC Docket No. 91-141). Only USTA expresses opposition to the continuation of the monitoring program.[5] USTA argues that monitoring is no longer necessary to achieve the purposes for which the program was first developed and recommends that the report be discontinued, unless there is a decision to use the report for purposes other than what was originally contemplated. Southwestern suggests that the usefulness of the report be reviewed on a periodic basis, to determine if the report should be continued for a full five years.

6. Most parties do not specifically comment on the frequency and timing of the reports, but those that do comment suggest changes from the current schedule of two reports per year, released in January and July. GTE supports shifting the release dates to April and October. Pacific, Southwestern, USTA, and US West recommend that the frequency be reduced to one annual report. US West suggests that the report be released on April 1. USTA

[1] MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 78-72 and 80-286, 2 FCC Rcd 3298 (1987).

[2] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 2 FCC Rcd 5266 (1987).

[3] Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket No. 87-339, 5 FCC Rcd 1979 (1990).

[4] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Establishment of a Program to Monitor the Impact of Joint Board Decisions, CC Docket Nos. 80-286 and 87-339, 6 FCC Rcd 4481 (1991).

[5] Ameritech makes a statement that it supports the positions in the USTA filing, and therefore can be interpreted to agree with this opposition.

recommends releasing an annual report in April or May, or alternatively in July or August. It also questions the value of releasing separate sections of the report by the Common Carrier Bureau's Industry Analysis Division.

7. The only comments on the format of the reports relate to the proposal that as much of the statistical information in the report as possible be made available in computer readable format. DC suggests that the Commission mandate that electronic data be submitted in a standard format, such as PARADOX or DBASE, and that a copy of the electronic data be provided to state commissions at no charge. In its reply comments, USTA opposes any changes that would force carriers to reformat their data. Bell Atlantic, BellSouth, NYNEX, Southwestern, US West and USTA support the addition of the proposed two new sections of the report only if the carriers do not have to reformat and resubmit the data that is being submitted to ARMIS that would be used for those sections.

8. Ameritech proposes expanding the monitoring program to collect information from competitive access providers (CAPs). It argues that a report without information on CAPs is significantly flawed. USTA also recommends that data be sought from alternate providers of interstate services. In their reply comments, MCI and MFS oppose Ameritech's proposal. MFS notes that CAPs presently file circuit reports with the Commission, providing information on the size and growth of CAPs. MCI asserts that CAPs are so small that they will have a negligible effect on industry totals or the usefulness of the reports. It also states that CAPs do not provide the breadth of services available from the local exchange carriers (LECs). It argues that any CAP reporting requirements should arise out of the interconnection docket (CC Docket No. 91-141) rather than out of the monitoring program.

9. The proposal drawing the most comments is the proposed deletion of the bypass section of the Monitoring Reports. Most of the comments support, or do not oppose, the deletion of this section, but many qualify their position with reservations. Only US West argues in favor of continuing the bypass section. It maintains that, although the bypass estimates are flawed, some measure of the extent of access competition in the local exchange marketplace is needed. It suggests that bypass providers, resellers, and end users be required to provide bypass information, and that the Joint Board should establish acceptable and common criteria for the measurement of all forms of bypass.

10. In its reply comments, USTA agrees that reports from CAPs would improve the accuracy and usefulness of bypass information. In its reply comments, MCI argues that US West's request should be denied because the information that US West suggests be incorporated into the monitoring program is proprietary. MCI contends that calls for increased reporting of bypass are nothing more than the use of Commission resources for competitive marketing intelligence gathering. Ameritech indicates that it supports the deletion of the bypass section only if information about CAPs is included in the Monitoring Reports. Southwestern expresses concern that if the bypass section is eliminated, there will be nothing to remind legislators and regulators that bypass exists. It suggests that interexchange carriers should provide bypass data, such as the AT&T facility bypass data that was published in the last two July Monitoring Reports.

11. Pacific supports elimination of the bypass section as long as it is not construed to detract from the importance of considering bypass in other access proceedings. Ameritech and USTA are concerned that the elimination of the bypass section might be taken as an indication that bypass has been eliminated. GTE objects to the implication that the bypass reports have not revealed any harmful effects. BellSouth, MFS, NYNEX, Southwestern, USTA, US West, and MCI (in its reply comments) all cite the problems in getting accurate bypass estimates from the LECs. Southwestern says these estimates can be expected to get even less precise in the future.

12. MFS and MCI (in its reply comments) argue that the bypass reports are misleading, due to their failure to distinguish between economic and uneconomic bypass, or to account for the increased service demand stimulated by CAPs. In its reply comments, MFS states that elimination of the bypass section should indicate that the data is inaccurate, not that bypass does not exist. Bell Atlantic says that the bypass reports are expensive to produce and have served their purpose. Ameritech notes that elimination of the bypass section should signal a shift away from the concern for bypass to the acceptance of competition.

13. The proposed new infrastructure section is supported by most of the comments. DC says this new section will assist it in keeping it informed of new technologies and innovations which impact the regulatory environment. Iowa states that having this data available in the Monitoring Report will lead to consistent regulatory decisions across jurisdictions and provide a way to assess the impacts of those decisions. The main concern expressed by several filing parties about this new section is the possibility that additional reporting requirements might be imposed on the LECs.[6] Pacific expresses concern that this infrastructure information is required currently only for the initial price cap period, and its inclusion in this monitoring program may be prematurely extending that reporting requirement.

14. USTA says that any changes in the infrastructure reporting requirements should be handled in the price caps docket (CC Docket No. 87-313) and not in the monitoring program. Southwestern questions the relevance of including the infrastructure information in CC Docket No. 87-339. MCI suggests that the data tables in this section be structured to show multiple reporting years to allow discernment of trends and other changes over time. Bell Atlantic, USTA, and US West express concerns about the proposed request for information about new or experimental services or infrastructures. Bell Atlantic argues that this request is unlikely to produce useful information. It says that this information is confidential, and therefore this proposal should be deleted or clarified as being voluntary. USTA warns that comparisons among carriers may be invalid or impossible due to different levels of reporting. US West says that "new services" should be clarified to mean those that are being newly offered under tariff. It is concerned that the public will be mislead if market trials and technical trials are included. It maintains that to avoid the release of proprietary information, only public information on "experimental services" should be included. It cautions that geographical and demand variation among regions could affect inter-regional comparisons.

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[6] *See* Para. 7, supra.

15. The proposed new section on revenues, expenses and investment is also generally supported, as long as the LECs do not have to reformat their ARMIS data submissions. Iowa states that this section will save the resources of state regulatory commissions in compiling this information, and will provide users a common data base from which to analyze changes in industry costs and revenues, and thus facilitate the development of sound regulatory policies. Pacific says that it may seek confidential treatment of information it deems to be proprietary (such as information on non-regulated activities). MCI suggests that the data tables in this section be structured to show multiple years to allow discernment of trends and others changes over time.

16. NYNEX, Southwestern, and USTA also comment on the proposed changes in the network usage and growth section. They all support the proposed elimination of SPF and SLU data from the reports. Southwestern and USTA state that the transitional DEM factor should also be eliminated from the reports after the completion of the transition period in 1992. NYNEX and USTA contend that message data should also be eliminated from the reports. They argue that call completion information is no longer always available, making message count estimates unreliable. NYNEX and USTA also note that DEM data are available in the ARMIS reports and suggest that the information be gathered from that source instead of a separate data collection.

III. DISCUSSION

17. We agree with the majority of the commenting parties that the information in the Monitoring Reports is too valuable to warrant a termination of the program. Much of the information in the reports is unavailable from other sources and is widely used by federal and state regulators and legislators, as well as by the industry, the press, academics, and the general public. It is useful to have in one place information that can be used to track developments in the industry as well as the potential impacts of recent and future regulatory changes, including separations changes, rate changes, and incentive regulation plans. Further, although the reports have not revealed to date any harmful effects of the decisions which led to the establishment of the monitoring program, some of the impacts of those decisions bear continued monitoring. These include the flows of funds between carriers to finance the lifeline programs, the Universal Service Fund, and the long-term support payments to the NECA common line pool.

18. We believe that those who suggest that the frequency of the reports be reduced to once a year make a valid point. Having one comprehensive report containing all of the information, instead of two partial reports containing parts of the information (as was proposed in the Request for Comments), will further our goal of having this information together in one place. The original reason for suggesting the continuation of two reports per year was to make the information publicly available in as timely a fashion as possible. However, that goal could be accomplished by making information received well in advance of the publication of the Monitoring Report available on an interim basis in separate Commission staff reports. We find the May release suggested by USTA to be a reasonable choice. This should allow the inclusion of ARMIS information that is filed at the beginning of April.

19. The Commission's Industry Analysis Division has recently established an electronic bulletin board by which the states may exchange information with the Commission, and we think this would be an appropriate forum for making the Monitoring Report data electronically available. Because of the rapid changes in computer hardware and software, we do not believe it is appropriate to mandate specific computer formats for the data. Rather, we suggest that the Bureau staff continue to be delegated the authority to consult with those submitting data and to specify the format of the data. We do recommend that widely used and available formats be used whenever possible. It is not our intention to impose reformatting requirements for those submitting ARMIS or other data. We believe the Commissions's staff and computer resources are capable of handling any reformatting that may be required to make the information available in summary form for the reports.

20. In recommending an extension of the monitoring program, it is not our intention to impose any new reporting requirements on any party. Therefore, we decline to recommend the collection of information on CAPs suggested by Ameritech. We agree with MCI that any CAP reporting requirements should arise out of the interconnection docket.

21. We believe that the bypass reports should be discontinued. The inherent difficulties in measuring bypass and distinguishing between economic and uneconomic bypass, combined with the substantial reduction in the carrier common line charges over the last few years which has reduced the incentives for uneconomic bypass of switched services, leads us to recommend the discontinuation of the LEC bypass reports after 1992.

22. We believe that the infrastructure information is important for assessing developments in the telephone network in light of recent regulatory changes. While we agree with USTA that any changes in infrastructure reporting requirements should be handled in the price caps docket, and therefore recommend that reporting requirements be deferred to the price cap docket, we also believe that whatever information is collected therein should be made publicly available in the Monitoring Reports. The request for information on new and experimental services and infrastructures is intended as a voluntary forum for exchanging information. Because this request is voluntary, we do not believe it is important to precisely define the terminology in advance, and we recognize the inherent limitations of the information that is collected.

23. We are persuaded by the commmenting parties that the new section on revenues, expenses and investment should use whatever information on these items is publicly available in the ARMIS reports. Pacific asks for proprietary treatment of some of this information. We believe this is not warranted because we only recommend that summary totals be included in the reports.

24. We agree that it will no longer be necessary to report the transitional DEM factor in the network usage and growth section once the transition period has ended. We decline to recommend any other changes from the Request for Comments at this time. We believe that any further consideration of changes in this section of the report be deferred until the question of replacing STARS with new usage measurement programs has been settled.

IV. RECOMMENDATIONS

25. We recommend that the monitoring program in CC Docket No. 87-339 be extended for an additional five years, until 1997. We recommend that this remain an open docket in which comments and materials may by submitted at any time.

26. We recommend that, from 1993 until 1997, an annual Monitoring Report be released in May of each year. We recommend that the report be released in paper format, and that as much of the report as possible also be made available in electronic format. We suggest that information received well in advance of the publication date of the Monitoring Report also be made available on an interim basis in separate staff reports.

27. As has been the case, the details of the program may change over time, to the extent that suggested changes in the program are determined to be in the public interest. We recommend that the Common Carrier Bureau continue to be directed to prepare the information requests and reports required for this program. We recommend that, at least initially, the content of the reports be as outlined below.

A. Subscribership and Penetration Levels

28. We recommend that this section continue to include estimates of the number and percentage of households with telephone service, based on the Current Population Survey conducted by the Bureau of the Census. We also recommend that comparable information from the 1990 decennial census be included when it becomes available.

B. Lifeline Assistance Plans

29. We recommend that this section include information on the participation in and costs of the Federal lifeline and Link-Up America programs. In addition, we encourage state agencies and telephone companies to provide additional information related to these programs for inclusion in this section.

C. High Cost Assistance

30. We recommend that this section continue to include information supplied by NECA on non-traffic sensitive costs and high cost assistance in its administration of the Universal Service Fund.

D. Network Usage and Growth

31. We recommend that this section continue to include information on access minutes, DEM minutes and factors, and messages. We recommend that transitional factors, such as SPF, only be reported for those companies for which the transition period has not yet ended.

E. Rates

32. We recommend that this section continue to include price index information supplied by the Bureau of Labor Statistics, as well as information on rates and rate cases supplied by the telephone companies. We recommend that this rate information include LEC access charges, and basic interstate toll rates charged by AT&T, MCI, and Sprint.

F. Revenues, Expenses and Investment

33. We recommend that this section include publicly available data from ARMIS summarizing information for Tier 1 carriers on revenues, expenses and investment by jurisdiction, by state, and by company. We recommend that the data in this section include revenues, total expenses and taxes, net income after operating expenses and taxes, plant in service and other investments, reserves (including accumulated depreciation/amortization and other), and net investment. For each of these, we recommend publishing the total company amount subject to separations, the state amount, the interstate amount, and the percent interstate.

G. Pooling

34. We recommend that this section include information on the administration of NECA's non-traffic sensitive and traffic sensitive pools, as well as information on long-term support payments to the NECA common line pool.

H. Infrastructure and New Services

35. We recommend that this section include information from ARMIS on infrastructure, collected as part of price caps monitoring in CC Docket No. 87-313. This includes information on switching equipment, transmission facilities, LEC call set-up time, access lines and book costs. In addition, we encourage states and companies to voluntarily submit whatever information they wish to share about new or experimental services or infrastructures. We recommend that this information be summarized in this section.

V. ORDERING CLAUSE

36. Accordingly, the Joint Board RECOMMENDS that the Commission adopt the proposals discussed above.

FEDERAL COMMUNICATIONS COMMISSION
for the Federal-State Joint Board

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of Applications of

NORRIS SATELLITE COMMUNICATIONS, INC.

File Nos. 54-DSS-P/L-90
55-DSS-P-90

Application for Authority to Construct, Launch and Operate Communications Satellites in the Ka-Band

ORDER AND AUTHORIZATION

Adopted: June 19, 1992; **Released: July 7, 1992**

By the Commission:

I. INTRODUCTION

1. Norris Satellite Communications, Inc. (NorSat) has filed an application to construct, launch and operate a domestic fixed-satellite (NorStar I) to operate in the 20/30 GHz frequency bands (Ka-band).[1] NorSat also proposes to construct another domestic satellite (NorStar II), which will be held in reserve as an on-ground spare. Public notice of this application was given on October 3, 1990, and comments were filed by numerous parties.[2] GTE Spacenet Corporation (GTE) filed a Petition to Deny NorSat's application,[3] and NorSat replied.[4] For the reasons discussed below, we grant NorSat's fixed-satellite application.

II. BACKGROUND

2. NorSat is a Delaware corporation formed to promote and implement new telecommunications services. The company is owned by John H. Norris (51%) and Mary Cathryne Park (49%). Both are U.S. citizens. Mr. Norris, through a number of other entities, is the licensee of several broadcast stations in Pennsylvania, and of a transmit/receive earth station in the domestic fixed-satellite service.

3. By its application, NorSat seeks to implement the first domestic, commercial satellite operating in the Ka-band (NorStar I). According to NorSat, the band's potential commercial uses include, among other things, video distribution, high-speed data networking using VSAT terminals[5] and government services such as supercomputing networks linking government agencies, universities and corporations.

4. While NorStar I is designed to receive in the 29.3-30.0 GHz band and to transmit in the 19.5-20.2 GHz band, NorSat requests use of only the 29.5-30.0 GHz and 19.7-20.2 GHz frequency bands. NorStar I will carry 24 transponders, each with a bandwidth of 24 MHz, powered by 90 watt traveling wave tube amplifiers (TWTAs). This satellite will be capable of providing service to the contiguous United States (CONUS), Alaska and Hawaii, with a total of eight spot beams. Designed for an expected life of ten years, NorStar I will operate with effective isotropically radiated power levels (EIRPs) ranging from 53 dBW per channel in dry areas of the Southwest to 65 dBW per channel in Florida.[6] Uplinking is planned on a CONUS basis, as well as from spot beams in the Southeast and Northwest. NorSat proposes to commence construction of NorStar I within twelve months of the grant of its application, and to launch its satellite within 42 months after authorization. The company requests an orbital location of 90^0 West Longitude (W.L.), and proposes to offer its services on a non-common carrier basis.

5. NorSat estimates the capital costs of constructing and launching its system to be $190 million, and anticipates lifetime revenues of $630 million. NorSat offers no evidence, however, of a firm financial commitment for construction and launch of its system.[7] It is in the process of

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[1] On July 16, 1990, NorSat filed an application to implement a domestic satellite that will provide General Satellite Services (GSS), a combination of fixed-, mobile- and broadcast-satellite services operating on a co-primary basis, in the Ka-band. Because the requested frequencies (19.7-20.2 GHz (downlink) and 29.5-30.0 GHz (uplink) are allocated on a primary basis to the fixed-satellite service, NorSat concurrently filed a petition for rulemaking requesting the reallocation of these frequencies to GSS. Action on that request for rulemaking (RM-7511), as well as NorSat's request for a pioneer's preference, is pending. On November 7, 1991, NorSat asked the Commission to proceed with the processing of the fixed-satellite (FSS) portion of its space station application, and to act on the GSS application at such time as its reallocation petition is granted. NorSat has reiterated its commitment and ability to proceed with implementation of its FSS system regardless of the ultimate disposition of its rulemaking request. Accordingly, we are herein discussing only that portion of NorSat's application that deals with fixed-satellite services. Action will be taken on the remainder of NorSat's application following disposition of its petition for rulemaking and request for pioneer's preference.

[2] Supporting comments were filed by thirteen parties. Additional comments were filed by Geostar Messaging Corporation (Geostar), Motorola Satellite Communications, Inc. (Motorola) and the American Mobile Satellite Corporation (AMSC). *See* n.9, *infra*.

[3] Petition to Deny, November 13, 1990. *See also* GTE's Reply to Opposition, January 22, 1991.

[4] Opposition to Petition to Deny and Reply Comments, January 7, 1991.

[5] The Ka-band's higher frequencies and the lack of congestion offer the potential for greater data transmission rates.

[6] Ka-band frequencies are very susceptible to rain fade attenuation. *See* para. 17, *infra*. The use of high levels of EIRP is consistent with domestic and international regulations (*see* International Telecommunication Union Radio Regulation 873 and Article 28) since there is no power flux density (PFD) limit for the 19.7-20.2 GHz band.

[7] To fund the construction, launch and operation of its system, NorSat intends to rely on (1) future sales of transponder capacity, (2) the funds of its principal, John H. Norris, and (3) some form of debt financing, which the company is now attempting to secure.

attempting to raise the necessary funding and has asked for a waiver of our existing financial requirements for applicants in the domestic fixed-satellite service.[8]

6. GTE has petitioned to deny NorSat's application on a number of grounds.[9] GTE alleges that NorSat has not set forth its demand estimates with sufficient specificity and that it has not shown its ability to comply with the Commission's two-degree spacing requirements for domestic fixed-satellites. GTE also argues that NorSat fails to meet existing standards for financial qualification.

III. DISCUSSION

A. Financial Qualifications

7. Sections 25.140(b)-(e) of the Commission's rules, 47 C.F.R. §25.140(b)-(e), set forth the standards for financial qualification in the domestic fixed-satellite service. These rules require applicants to estimate their costs of construction, launch and one year's system operation, and to demonstrate that the applicant has either (1) current assets, (2) a fully-negotiated credit arrangement, or (3) a fully negotiated sale or lease of assets or transponder capacity sufficient to cover these estimated costs. NorSat has not presented us with firm debt or equity commitments, nor has it demonstrated current assets, sufficient to meet the costs of its system.[10] However, the applicant requests a waiver of the financial requirements.[11] NorSat argues that, as both a new entrant and a user of a new frequency band, such a waiver is warranted to promote commercial development of the Ka-band, and that a waiver will not preclude use of the requested frequencies by another qualified applicant.

8. Grant of a waiver[12] of our financial standards is appropriate only if special circumstances warrant a deviation from the general rule[13] and such deviation will serve the public interest.[14] In addition, the waiver request must be consistent with the general principles underlying the rule for which a waiver is requested.[15] For the reasons set forth below, we believe that a waiver is appropriate in this situation.[16]

9. NorSat alleges, and we agree, that special circumstances are present here. NorSat is the only applicant currently requesting use of the Ka-band to provide fixed-satellite services. There are no commercial FSS users of the band, and the entire orbital arc remains available to future applicants. Unlike the provision of FSS in the C- and Ku-bands, use of the Ka-band requires the development of new space and ground segment technology. NorSat alleges that it thus faces unique commercial and technical obstacles as the proposed initial Ka-band FSS provider, and should therefore not be held to our ordinarily stringent financial requirements. We agree with NorSat and conclude that because NorSat is the only commercial FSS applicant in a new and vacant frequency band, there exists here a very narrow set of circumstances that warrants waiver of our financial rules.

10. Further, we believe that such a waiver will promote the public interest. Specifically, granting NorSat a waiver will encourage the development of space and ground station technology in the Ka-band, which should result in the development of new markets and services. The waiver grant will also insure the availability of adequate fixed-satellite capacity as other frequency bands become congested. An additional key consideration is that this waiver will not preclude additional entities from implementing their own systems in this band. There continues to exist a clear opportunity for other applicants to seek and to receive Ka-band orbital assignments.[17] Accordingly, NorSat

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[8] *See* 47 C.F.R. §25.140(b)-(e).

[9] Geostar, Motorola and AMSC have also filed comments regarding, but have not petitioned to deny, NorSat's application. Specifically, AMSC disagrees with NorSat's contention that NorSat's proposed GSS system will eliminate the need for additional L-band allocations for MSS. Accordingly, AMSC requests that we not view any future grant of the MSS portion of NorSat's application as a solution to what AMSC perceives as a shortage of spectrum in the L-band for MSS. Motorola and Geostar have applications on file at the Commission requesting use of portions of the Ka-band for feeder links and TT&C operations. They request more analysis regarding the potential impact of NorSat's proposed MSS and broadcast operations upon existing and planned FSS usage in the Kaband. These issues are being considered in the pending reallocation proceeding, RM-7511, and will also be considered when the Commission acts upon the GSS portion of NorSat's application.

[10] *See* n.7, *supra*.

[11] NorSat suggests that the Commission adopt a "due diligence" approach to their financial situation. GTE comments that the current financial standard for FSS has promoted the development of fixed-satellite systems by well-managed, qualified firms. Accordingly, GTE urges the Commission not to abandon its financial qualification requirements in such a way as to erode the current standard. While not opposing NorSat's argument that some lesser financial standard is warranted in this instance, GTE does not agree that a "due diligence" standard should be adopted. Instead, GTE suggests that NorSat should be held to a one year schedule for the securing of firm financing, and be required to complete construction of NorStar I within three years of grant. We do not believe that GTE's proposed standard will add greater certainty to the timely implementation of NorSat's system. NorSat itself proposes to commence construction within one year, and to complete construction within 38 months of authorization. Moreover, since the waiver grant for NorSat is only appropriate given the special circumstances of this application, we are specifically not abandoning the current financial qualification requirement. *See* para. 25, *infra*.

[12] The Commission may waive its rules for good cause shown. 47 C.F.R. §1.3.

[13] NorSat bears the burden of pleading the specific facts and circumstances that warrant its requested waiver. *Rio Grande Family Radio Fellowship, Inc. v. FCC*, 406 F.2d 664, 666 (D.C. Cir. 1968) (per curiam). The articulation of these special circumstances is necessary to prevent discriminatory application of the Commission's waiver powers, and to put future applicants on notice as to its operation. *Northeast Cellular Telephone Company v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *Northeast Cellular Telephone Company, v. FCC*, *supra*, citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

[15] *City of Angeles Broadcasting, Inc. v. FCC*, 745 F.2d 656 (D.C. Cir. 1984).

[16] GTE asks that we disclose the contents of Mr. Norris's financial statement, which he has requested remain confidential. Because we grant NorSat a waiver of our financial qualification rules, we need not reach the issue of whether Mr. Norris's statement should be disclosed.

[17] It is also significant that NorSat's application has been a matter of public record since October 1990, yet no other Ka-band applications have been filed, and none are pending. However, we expect that, given NorSat's technical design, additional

will not be holding its orbital location to the exclusion of other users of the band while it is in the process of securing its financing.[18]

11. Finally, we believe that a waiver of our financial rules in this narrow circumstance will not run afoul of the basic purpose of those rules. The general principle underlying our financial qualification standards is that scarce orbit-spectrum resources should not lie fallow nor should implementation of service to the public be delayed because of an applicant's financial inability to construct, launch and operate its authorized system in a timely manner.[19] Here, the orbit-spectrum resource will continue to remain fallow if the standard is *not* waived. Nor is service to the public likely to be unduly delayed. Although we are waiving our financial qualification requirements, we will require NorSat to proceed with the construction and launch of its satellite in compliance with the milestones set forth in paragraph 25, *infra*. These milestones will insure that NorSat's system is implemented in a timely manner,[20] to the benefit of its ultimate users, and will deter the filing of speculative or otherwise premature applications in this band.

B. Technical Qualifications

12. GTE also raises a number of issues questioning NorSat's technical qualifications to become a Commission licensee. We discuss each of these in turn.

(1) Demand Studies.

13. Initially, GTE suggests that NorSat has not properly detailed the demand for its proposed services. Section 25.114 of the Commission's rules, 47 C.F.R. §25.114, requires an applicant for domestic space station authority to describe, among other things, the estimated demand for its proposed services.[21] In Exhibit I-G of its application, NorSat presents a chart detailing its estimated transponder usage over the life of NorStar I. Further, Sections 2.0-2.6 of NorSat's application discuss the estimated demand for service and the company's potential user base. Given the uncertainties inherent in determining the user base for a satellite system several years in advance of its implementation, particularly here, where the applicant proposes the use of a new frequency band, we believe the application sets forth the demand estimates with sufficient specificity to meet our processing requirements. [22]

(2) Interference Analysis

14. GTE also questions whether NorSat's interference analysis[23] demonstrates that its proposed FSS satellite will be able to operate compatibly with other FSS satellites in a 2^0 spacing environment.[24] Specifically, GTE notes three "inconsistencies" between NorSat's application and NorSat's interference analysis that it believes have a material bearing on the validity of the interference analysis.

15. First, GTE correctly notes that NorSat's application specifies consistent transponder bandwidths of 24 MHz,[25] while its interference analysis indicates varying bandwidths from 24 MHz to 54 MHz. While the interference analysis is thus not wholly consistent with NorSat's application, we have sufficient information, even disregarding the information detailing bandwidths larger than 24 MHz, upon which to make a reasoned analysis of the interference potential of NorStar I. Moreover, the exhibit, viewed generically, is useful in projecting future potential interference into NorSat's system if an adjacent satellite operator should ultimately choose to utilize the greater bandwidths contained in NorSat's analysis.

16. Second, GTE alleges that the NorSat interference analysis includes traffic characteristics for four carrier types taken from a comparable Ku-band satellite, and that the carrier signal levels should have been increased to compensate for the increased rain fade at the Ka-band. According to NorSat's Further Response, the link carrier-to-thermal noise ratio (C/N) for the four low-capacity car-

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Ka-band systems may be licensed with 2^0 orbital spacings. Additional systems will be able to be authorized even if NorSat's GSS proposal, which could require orbital spacings greater than 2^0 between space stations, is ultimately granted.

[18] As discussed at n.7, *supra*, NorSat has presented its plan for meeting the costs of constructing, launching and operating its system. In the radiodetermination satellite service, where multiple entry was also possible and where we were seeking to promote the development of new technology, we have held that such a showing is adequate to support a determination of financial fitness. *See, e.g., Second Report and Order* in Gen. Docket No. 84-689, 104 FCC 2d 650 (1986) (establishing policies and rules governing the provision of radiodetermination satellite services). Therefore, multiple entry capability in the Ka-band, combined with the other factors outlined above, we believe similarly supports reduced financial scrutiny in the form of a waiver of our financial rules.

[19] Amendment of Parts 2, 22 and 25 of the Commission's Rules to Allocate Spectrum for and to Establish Other Rules and Policies Pertaining to the Use of Radio Frequencies in a Land Mobile Satellite Service for the Provision of Various Common Carrier Services, 4 FCC Rcd 6029, 6032-33 (1989).

[20] The Commission will closely monitor NorSat's compliance with its construction and launch milestones, and may seek information from the company to ascertain if these milestones are being satisfied. *See* 47 C.F.R. §25.111(a). Construction and launch deadlines contained in space station authorizations are not routinely extended. Section 25.117 of the Commission's rules requires a licensee seeking such an extension to verify that "(1)... additional time is required due to unforeseeable circumstances beyond the applicant's control... or (2)... there are unique and overriding public interest concerns that justify an extension." 47 C.F.R. §25.117(e)(1) and (2). *See also* MCI Communications Corporation, 2 FCC Rcd 233 (1987) (complexities involved in major corporate acquisition are not circumstances beyond a licensee's control, and will not support an extension of construction and launch milestones).

[21] *See also* Filing of Applications for New Space Stations in the Domestic Fixed-Satellite Service, 93 FCC 2d 1260 (1983), Appendix B, para. II. E.

[22] The long lead time involved in the construction of a satellite system requires somewhat speculative assessments of the market for domestic satellite services. *See, e.g.,* RCA American Communications, Inc., 94 FCC 2d 441 (1983); Satellite Business Systems, 94 FCC 2d 447 (1983).

[23] On November 7, 1991, NorSat filed a Further Response to GTE's petition to deny, containing an interference analysis and certain financial information pertaining solely to its fixed-satellite operations.

[24] Comments of GTE Spacenet Corporation, December 10, 1991. Section 25.140 (b)(3) of the Commission's rules requires any applicant for space station authorization in the domestic fixed-satellite service to provide an interference analysis demonstrating the compatibility of its proposed system 2 from any authorized space station. 47 C.F.R. §25.140(b)(3).

[25] Part II of NorSat's application actually indicates that the transponder characteristics could accommodate carriers with RF bandwidths as large as 26 MHz.

riers range from the low teens to the high twenties. Based on the link performances, we expect that one of the low C/N carriers would experience some degradation during a heavy rainfall period. With respect to the other carriers, we believe that they have a sufficient rain margin.

17. Third, GTE states that, while NorSat's application specifies the use of circularly polarized antennas, its interference analysis assumes linear polarization. The polarization analysis presented by NorSat is nonetheless valid, provided that the adjacent satellites are cross-polarized in a similar linear or circular manner. Thus, none of the inconsistencies discussed by GTE has a material bearing on our ability to determine the interference potential of NorStar I.

18. Taken as a whole, NorSat's interference analysis does show that there could be some interference into adjacent Kaband satellites operating at two degree spacing. Since the potential interference is likely to involve low-capacity carriers in the downlink transmissions only,[26] we believe that necessary coordination can be carried out successfully on a case-by-case basis. This is a common and workable practice in both the C- and Ku-bands presently.[27] Accordingly, we find that NorSat's proposed operations demonstrate satisfactory compliance with existing spacing requirements for domestic fixed-satellites.

C. Orbital Location

19. NorSat requests use of the 90^0 W.L. orbital location. This location, NorSat asserts, will facilitate the use of very small aperture earth station antennas; will maximize the ability of the satellite to overcome rain attenuation, which is particularly acute in the Ka-band around the Florida region; will permit optimum performance of NorStar I; and will meet the expectations of NorSat's major customers. In addition to meeting the technical and commercial desires of the applicant, this assignment would be consistent with our policy of assigning, when possible, at least one location in the requested frequency band from which a new entrant can provide fifty-state coverage.[28] This location is 10 away from the location assigned to NASA's experimental ACTS satellite, which will also use a portion of the Ka-band. Due to this wide spacing, we perceive no potential interference problems between the two satellite systems. Accordingly, we will assign NorStar I to the 90^0 W.L. orbital location.

D. Common Carriage

20. Finally, NorSat requests authority to offer all of the capacity on its NorStar I satellite on a noncommon carrier basis. No comments were offered with respect to this request. In our 1982 *Order* regarding Domestic Fixed-Satellite Transponder Sales,[29] we found that the authorization of noncommon carrier transponder transactions is consistent with our policies fostering multiple satellite entry.[30] Domestic satellite licensees thus are routinely authorized to offer transponders on a noncommon carrier basis absent a showing that it will not be in the public interest[31] Based on NorSat's representations, we find that the proposed fixed-satellite transponder transactions are consistent with our transponder sales policies.

IV. Conclusion and Ordering Clauses

21. The Ka-band currently is unused commercially for space telecommunications service. We agree with NorSat that promoting the use of this portion of the Ka-band for commercial space applications is desirable. In addition to serving as an expansion alternative to the C- and Ku-bands for traditional fixed-satellite services, use of the Ka-band may increase and improve service options available to consumers. Upon review of NorSat's application to implement a system to provide these services and related pleadings, we find that NorSat is technically qualified to be a Commission licensee and that the public interest supports a waiver of our financial requirements as discussed above. We further find, pursuant to Section 309 of the Communications Act of 1934, as amended, 47 U.S.C. §309, that grant of this application will serve the public interest, convenience and necessity.

22. Accordingly, IT IS ORDERED that Application File Nos. 54-DSS-P/L-90 and 55-DSS-P-90 ARE GRANTED and Norris Satellite Communications, Inc. IS AUTHORIZED to construct two domestic communications satellites to operate in the 19.7-20.2 GHz and 29.5-30.0 GHz frequency bands, in accordance with the terms, conditions and technical specifications set forth in its application.

23. IT IS FURTHER ORDERED that Norris Satellite Communications, Inc. IS AUTHORIZED to launch and operate one space station in the domestic Fixed-Satellite Service in accordance with the relevant terms and conditions of all previous orders and authorizations concerning the operation of space stations.

24. IT IS FURTHER ORDERED that Norris Satellite Communications, Inc. IS AUTHORIZED to sell 24 transponders on its NorStar I satellite.

25. IT IS FURTHER ORDERED that, unless extended by the Commission for good cause shown, this authorization shall become null and void in the event that the space station is not constructed, launched and successfully placed into operation in accordance with the technical parameters and terms and conditions of the authorization by the following dates:

	Construction Commenced	Construction Completed	Launch
NorStar I	July 1993	September 1996	January 1997
NorStar II	July 1994	September 1997	-----

[26] *See* Table C, NorSat interference analysis, n.23, *supra*.

[27] As in the past, we expect that satellite operators will negotiate in good faith to reach workable coordination agreements. *See, e.g.*, Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 5 FCC Rcd 179 (1990).

[28] Assignment of Orbital Locations to Space Stations in the Domestic Fixed-Satellite Service, 3 FCC Rcd 6972 (1988).

[29] Domestic Fixed-Satellite Transponder Sales, 90 FCC 2d 1238 (1982), *aff'd sub nom. Wold Communications, Inc. v FCC*, 735 F.2d 1465 (D.C. Cir. 1984).

[30] At that time, however, we cautioned that noncommon carrier satellites would not be authorized if it appeared that additional common carrier capacity was needed. No one has indicated that additional fixed-satellite capacity is needed here.

[31] *See* Martin Marietta Communications System, Inc., 51 Fed. Reg. 24223 (July 2, 1986).

26. IT IS FURTHER ORDERED that the license term for the space stations is ten years and will commence on the date the licensee certifies to the Commission that the satellite has been successfully placed into orbit and the operations fully conform to the terms and conditions of this authorization.

27. IT IS FURTHER ORDERED that Norris Satellite Communications, Inc., as required by Section 25.202(c) of the Commission's rules, 47 C.F.R. §25.202(c), will prepare the necessary submissions to the International Telecommunication Union (ITU) for advance publication, international coordination and notification of this space station in accordance with ITU Radio Regulations and for consultation in accordance with Article XIV of the INTELSAT Agreement within sixty days of the release of this order.

28. IT IS FURTHER ORDERED that the temporary assignment of any orbital location to Norris Satellite Communications, Inc. is subject to change by summary order of the Commission on 30 days' notice and does not confer any permanent right to use the orbit and spectrum. Neither this authorization nor any right granted by this authorization, shall be transferred, assigned or disposed of in any manner, voluntarily or involuntarily, or by transfer of control of any corporation holding this authorization, to any person except upon application to the Commission and upon a finding by the Commission that the public interest, convenience and necessity will be served thereby.

29. IT IS FURTHER ORDERED that the Petition to Deny filed by GTE Spacenet Corporation IS DENIED.

30. Norris Satellite Communications, Inc. is afforded 30 days from the date of release of this order and authorization to decline these authorizations as conditioned. Failure to respond within that period will constitute formal acceptance of the authorizations as conditioned.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sonix IV NAL/Acct. No.: 215HF0011
Inglewood, California

NOTICE OF APPARENT LIABILITY

Adopted: June 22, 1992; Released: July 8, 1992

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), to Sonix IV for willful violation of Section 302(b) of the Communications Act, 47 U.S.C. § 302(b), and Sections 18.307(a) (18.72(e) when this equipment was authorized) and 2.931 of the Commission's Rules, 47 C.F.R. §§ 18.307(a) & 2.931.

2. The appropriate amount of forfeiture for this violation is $10,000.

II. BACKGROUND

3. On August 1, 1991, the Sampling and Measurements Branch of the Office of Engineering and Technology (OET) purchased a Sonix IV Ultrasonic Cleaner, FCC ID: C437NQ902SYS, manufactured by Sonix IV from Benco Dental Supply Company in Wilkes-Barre, Pennsylvania. Measurements were made which indicated that the device produced AC line conducted emissions on 2.36 MHz at a level of 100,000 μV. The maximum level permitted by Section 18.307(a), formerly 18.72(e), of the Rules is 200 μV. The device purchased differed substantially from the one authorized under FCC ID: C437NQ902SYS-The approved device consists of an ultrasonic generator in one enclosure connected through a cable to a tank with multiple transducers in a second enclosure; whereas, the unit purchased on August 1 consisted of a small table-top unit with the ultrasonic generator, one transducer, and a tank in a single enclosure.

4. Section 2.931 provides in pertinent part that "In accepting a grant of an equipment authorization the grantee warrants that each unit of equipment marketed under such grant and bearing the identification specified in the grant will conform to the unit that was measured and that the data... filed with the application for type acceptance or certification... continues to be representative of the equipment being produced under such grant within the variation that can be expected due to quantity production and testing on a statistical basis."

5. Ultrasonic devices are Industrial, Scientific, and Medical Equipment, 47 C.F.R. § 18.107(f), and are required to be certified, 47 C.F.R. §18.203.

III. DISCUSSION

6. Sonix IV has violated Section 302(b) of the Communications Act by marketing an ultrasonic cleaner which does not conform to the equipment authorization and could not be certified.

7. The violation is willful.

8. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 6 FCC Rcd 4695 (1991), *modified in part on recon.*, FCC 92-212, 57 Fed. Reg. 24,986 (June 12, 1992), the base forfeiture amount would be $7,000. Because the emitted field strength was fifty times that authorized and the device marketed was substantially different from that authorized, it is consistent with the *Policy Statement* that the forfeiture amount be increased to $10,000.

IV. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Sonix IV IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $10,000 for marketing equipment in violation of Section 302(b) of the Communications Act. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Communications Act.

10. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's rules, 47 C.F.R. § 1.80(f)(3), that Sonix IV shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation. Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No.: 215HF0011" and mailed to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
Room 744
1919 M Street, NW
Washington, D.C. 20554

NAL/Acct. No.: 215HF0011

11. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for Monetary Forfeiture shall be sent, by registered mail, to Sonix IV, 7320 La Cienega Boulevard, Inglewood, California 90302.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Richards
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

CAROLINA TELEPHONE AND TELEGRAPH COMPANY, INC.,	File No. E-90-248
UNITED TELEPHONE OF THE CAROLINAS, INC.,	File No. E-90-249
UNITED TELEPHONE OF INDIANA, INC.,	File No. E-90-250
UNITED TELEPHONE OF NEW JERSEY, INC.,	File No. E-90-251
UNITED TELEPHONE OF OHIO, INC., and	File No. E-90-252
UNITED TELEPHONE OF TENNESSEE, INC.,	File No. E-90-253

Defendants.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

ORDER

Adopted: June 25, 1992; Released: July 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. LDDS Communications, Inc. (LDDS) filed the above-captioned complaints seeking damages resulting from the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 to December 31, 1988. The defendants have requested that the complaints be dismissed on the grounds that the complainant had not purchased interstate access services from them during the relevant period. The complainant subsequently reviewed its files and determined that, in fact, it had not purchased services from the defendants during the relevant period as alleged in its complaints and states that it does not oppose dismissal of the complaints with prejudice.

2. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the defendants' requests for dismissal ARE GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LDDS COMMUNICATIONS, INC.,
Complainant,

v.

BELL TELEPHONE OF PENNSYLVANIA,	File No. E-90-214
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-90-215
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-216
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-217
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-218
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-219
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-220
INDIANA BELL TELEPHONE COMPANY,	File No. E-90-221
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-222
OHIO BELL TELEPHONE COMPANY,	File No. E-90-223
NEW YORK TELEPHONE COMPANY,	File No. E-90-224
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-225
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-229
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY	File No. E-90-230
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-231
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-232
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-233
CONTEL OF INDIANA, INC.,	File No. E-90-238
CONTEL OF SOUTH GEORGIA, INC.,	File No. E-90-245
GTE NORTH INCORPORATED,	File No. E-90-246
and GTE SOUTHWEST INCORPORATED.	File No. E-90-247

Defendants.

ORDER

Adopted: June 25, 1992; Released: July 8, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, LDDS Communications, Inc. (LDDS), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that LDDS presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does LDDS in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. LDDS's damages claims rest primarily on the contention that the proper measure of the damages it has suffered as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damages award based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. The majority of defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant. In addition, some defendants maintain that the relevant rate of return is each operating company's overall rate of return, not each access category rate of return.[10] Some defendants maintain that they must be allowed to offset overearnings in individual access categories with underearnings in access categories.[11] The majority of defendants contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12] One defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to LDDS because LDDS would not flow through such damages to its own customers.[13]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which LDDS may have suffered actual damage as

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[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982, (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] LDDS also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by the defendants in response to LDDS's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they were part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] The Ameritech defendants contend that the relevant rate of return is the overall rate of return of Ameritech in the aggregate. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[11] *See, e.g.*, New England Telephone and Telegraph Company Answer and Motion to Dismiss at 4.

[12] *See, e.g.*, Bell Atlantic Joint Answer and Motion to Dismiss at 3.

[13] Pacific Bell Motion to Dismiss at 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with LDDS, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violation could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any "evidence submitted by defendants that would tend to show that LDDS's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding LDDS's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute LDDS's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDIAL AMERICA, INC.,
Complainant,

v.

INDIANA BELL TELEPHONE COMPANY, INC.,	File No. E-90-258
MICHIGAN BELL TELEPHONE COMPANY,	File No. E-90-259
OHIO BELL TELEPHONE COMPANY,	File No. E-90-260
NEW YORK TELEPHONE COMPANY,	File No. E-90-262
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-263
SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY,	File No. E-90-264
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-265
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-266
CINCINNATI BELL TELEPHONE COMPANY, and	File No. E-90-268
GTE NORTH INCORPORATED,	File No. E-90-269

Defendants.

ORDER

Adopted: June 25, 1992; Released: July 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Teledial America, Inc. (Teledial), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Teledial presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does Teledial in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circum-

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Teledial's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] Defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. The majority of defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant. In addition, some defendants maintain that the relevant rate of return is each operating company's overall rate of return, not each access category rate of return.[10] Several defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings.[11] Some defendants also contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[12] One defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Teledial because Teledial would not flow through such damages to its own customers.[13]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which Teledial may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Teledial, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Teledial's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding Teledial's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Teledial's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

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stances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Teledial also seeks interest on this amount. We note that some defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to Teledial's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] The Ameritech defendants contend that the relevant rate of return is the overall rate of return of Ameritech in the aggregate. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[11] *See, e.g.*, Answer and Motion to Dismiss of New York Telephone Company at 3.

[12] *See, e.g.*, Reply of Southwestern Bell Telephone Company at 1.

[13] Motion to Dismiss of Cincinnati Bell Telephone Company at 8. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[14]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[14] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AUTOMATED COMMUNICATIONS, INC.,
Complainant,

v.

CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-91-172
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-91-173
PACIFIC BELL TELEPHONE COMPANY,	File No. E-91-174
Defendants.	

ORDER

Adopted: June 25, 1992; Released: July 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Automated Communications, Inc. (ACI), may be entitled to recover damages as a result of defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that ACI presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. ACI's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the

[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] The complainants relied, as does ACI in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

period January 1, 1987 through December 31, 1988, and the amount it would have paid if the defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. The defendants raise a number of challenges to the complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[8] The defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in, *American Telephone and Telegraph Company v. FCC*[9] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to the complainant. Defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings in access categories.[10]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which ACI may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with ACI in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages incurred by complainant if defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories the defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages which can be attributed to defendants' excessive earning levels. Moreover, the defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by the defendants that would tend to show that ACI's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced due to facts and circumstances surrounding ACI's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by the defendants that would refute ACI's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if the defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to the complainant information necessary to compute the difference between the amount complainant actually paid for the defendants' access services during the relevant monitoring period and the amount complainant would have paid if the defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford the defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[11]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, defendants may perform the calculation and provide this information to complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the

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[7] ACI also seeks interest on this amount. We note that the defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant proceedings will depend on the particular facts established by the parties.

[8] The issues and arguments raised by defendants in response to ACI's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[9] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[10] Chesapeake and Potomac Telephone Company Motion to Dismiss at 4, n. 10; Pacific Bell Telephone Company Answer at para. 19.

[11] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT complainant and defendants shall file their initial briefs no later than 20 days after the close of the thirty day discovery period and that complainant and defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS
COMMUNICATIONS, INC.,
Complainant,

v.

CAROLINA
TELEPHONE AND
TELEGRAPH COMPANY,
Defendant.

File No. E-90-437

ORDER

Adopted: June 26, 1992; Released: July 7, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On September 5, 1990, Cable & Wireless Communications, Inc. (CWC) filed the above-captioned complaint against Carolina Telephone and Telegraph Company. The parties subsequently settled all issues and controversies in the complaint and filed a joint motion to dismiss. The joint motion to dismiss was granted and the proceeding was terminated. *See* Order, 7 FCC Rcd 2137 (Com.Car.Bur. 1992).

2. For a period prior to dismissal, the above-captioned proceeding was held in abeyance by order of the Enforcement Division of the Common Carrier Bureau.[1] CWC filed an application for review of the abeyance order. Because the underlying dispute has been resolved by agreement between the parties, the application for review is moot.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. §0.291, that CWC's Application for Review filed in the above-captioned proceeding IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[1] *See* Order, 6 FCC Rcd 697 (Com.Car.Bur. 1991). The abeyance was terminated after several months. *See* Order, 7 FCC Rcd 127 (Com.Car.Bur. 1991).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORP.,
Complainant,

v.

THE BELL TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-317
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY,	File No. E-90-318
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND,	File No. E-90-319
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA,	File No. E-90-320
THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA,	File No. E-90-321
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-90-322
NEW JERSEY BELL TELEPHONE COMPANY,	File No. E-90-323
NEW YORK TELEPHONE COMPANY,	File No. E-90-328
NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-329
THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-330
NORTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-331
PACIFIC NORTHWEST BELL TELEPHONE COMPANY,	File No. E-90-332
PACIFIC BELL TELEPHONE COMPANY,	File No. E-90-333
SOUTH CENTRAL BELL TELEPHONE COMPANY,	File No. E-90-334
SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-335
SOUTHWESTERN BELL TELEPHONE COMPANY,	File No. E-90-336
CINCINNATI BELL TELEPHONE COMPANY,	File No. E-90-337
GTE NORTH INCORPORATED,	File No. E-90-340
UNITED TELEPHONE COMPANY OF THE CAROLINAS, and	File No. E-90-342
UNITED TELEPHONE COMPANY OF PENNSYLVANIA,	File No. E-90-345
Defendants.	

ORDER

Adopted: June 26, 1992; Released: July 8, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent the complainant, Litel Telecommunications Corp. (Litel), may be entitled to recover damages as a result of defendants'[1] alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that Litel presents against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[2] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[3] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[4] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related

[1] Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company have consolidated. U S West Communications, Inc. (U S West) is the remaining company. *See* 5 FCC Rcd 1982 (1990). The subject complaints, however, relate to a period prior to the consolidation. Accordingly, we shall refer to the carriers as they were named in the complaints.

[2] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[4] The complainants relied, as does Litel in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[5]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainant and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[6] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[7]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Litel's damages claims rest primarily on the contention that the proper measure of the damages it has incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount it actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount it would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[8]

5. Defendants raise a number of challenges to complainant's damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*.[9] Defendants argue in unison that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[10] and, therefore, unlawful. The majority of defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainant. In addition, some defendants maintain that the relevant rate of return is each company's overall rate of return, not individual access category rates of return.[11] Several defendants maintain that, under *AT&T v. FCC*, they must be allowed to offset overearnings in individual access categories against underearnings.[12] Most defendants also contend that an award of damages based on the measure advocated by complainant would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.[13] Several defendants argue that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to Litel because Litel would not flow through such damages to its own customers.[14]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the

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[5] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order)* and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[6] Complainant and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[7] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[8] Litel also seeks interest on this amount. We note that several defendants argue that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[9] The issues and arguments raised by defendants in response to Litel's claims are identical in their essentials. For the sake of convenience and clarity, we will refer to defendants' arguments as if they are part of the same pleading. To the extent that individual defendants raise separate or unique arguments, we will address them accordingly.

[10] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[11] The United defendants contend that the relevant rate of return is the overall rate of return of United in the aggregate. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in these proceedings.

[12] *See, e.g.*, Answer and Motion to Dismiss of New York Telephone Company at 3.

[13] *See, e.g.*, Motion to Dismiss of Cincinnati Bell Telephone Company at 9.

[14] *See, e.g.*, Motion to Dismiss of Pacific Bell Telephone Company at 6. We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

extent to which Litel may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with Litel, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates it actually paid for defendants' interstate access services and the rates it would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainant in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainant's taking of their access service offerings to establish or support their claims that complainant suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainant's damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that Litel's share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding Litel's purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute Litel's claim that the damage it suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainant information necessary to compute the difference between the amount complainant actually paid for defendants' access services during the relevant monitoring period and the amount complainant would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainant and defendants.[15]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainant may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainant within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainant and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainant and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainant and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

[15] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-37

In the Matter of

SANDHILL BROADCASTING COMPANY

Licensee of Station WPSC(AM)
Pageland, South Carolina

Order to Show Cause Why the
License for Station WPSC(AM),
Pageland, South Carolina, Should
Not Be Revoked

ORDER

Adopted: June 26, 1992; Released: July 7, 1992

By the Chief, Mass Media Bureau:

1. This proceeding began on March 26, 1992, when the Commission released its *Order to Show Cause and Hearing Designation Order*, 7 FCC Rcd 2124 (1992) ("*OSC*"). The Commission ordered Sandhill Broadcasting Company (hereinafter, "Sandhill") to show cause why the license for WPSC(AM), Pageland, South Carolina, should not be revoked.[1] The Commission specified an issue "To determine whether Sandhill has violated §§ 73.1740 and/or 73.1750 of the Commission's Rules."[2] The Commission also specified an issue to determine whether, in light of the evidence adduced, Sandhill possesses the requisite qualifications to remain a Commission licensee. By *Order*, FCC 92M-629, released May 29, 1992, Presiding Administrative Law Judge Edward Luton terminated the hearing proceeding because Sandhill failed to file the requisite notice of appearance. Pursuant to § 1.92 of the Commission's Rules, the Judge also certified the case to the Commission.

2. The Commission's records indicate that WPSC(AM) has been off the air without authority since September 13, 1989. Attempts to communicate with Sandhill have proved fruitless. All correspondence, including the *OSC*, directed to Sandhill's last known address have been returned by the U.S. Postal Service as undeliverable. In light of the foregoing, we conclude that Sandhill has violated §§ 73.1740 and 73.1750 of the Commission's Rules and that Sandhill is not qualified to remain the licensee of Station WPSC(AM).

3. Accordingly, IT IS ORDERED, that the license of Sandhill Broadcasting Company for WPSC(AM), Pageland, South Carolina IS REVOKED.[3]

4. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Although the Commission included a *Notice of Apparent Liability* for willful or repeated violations of Commission rules, no forfeiture is being imposed because of the action taken herein.

[2] § 73.1740(a)(4) provides:

> (4) In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

§ 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[3] The Mass Media Bureau has been given delegated authority to issue revocation orders in silent station cases. *See Radio Northwest Broadcasting Company*, 4 FCC Rcd 596, n. 3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 24, 1992

Released: June 25, 1992

Mr. Fred Fickenwirth
Station Manager
KLEW-TV
Post Office Box 615
Lewiston, Idaho 83501

Dear Mr. Fickenwirth:

This is in response to your request for a ruling with respect to the calculation of lowest unit charge pursuant to Section 315(b) of the Communications Act of 1934, 47 U.S.C. Section 315(b).

You assert the following in connection with your request for ruling. Although your area of the country has escaped the recession relatively unscathed, the local media have been focusing on the recession in other parts of the country, thus affecting the attitudes and spending of local citizens. In an effort to give a balanced perspective on the economic state of your region, the Lewiston and Clarkston, Idaho, Chambers of Commerce (non-profit organizations under Section 501(c)(6) of the Internal Revenue Code) are sponsoring a multi-media public service campaign. The campaign focuses on positive aspects of the local economy, in particular, local businesses with successful stories to tell. Businesses highlighted in the campaign are not allowed to promote their products, nor do they derive any direct benefit from the campaign." Public service" advertisements appear on television (including on station KLEW-TV), radio, and in the newspaper, with all airtime and space donated by the respective media. The announcements aired as part of this campaign are "serving the community interest." You ask us to determine whether these public service announcements "conflict" with lowest unit charge regulations, i.e., whether the station's lowest unit charge would be zero for the classes and amounts of time and time periods in which these public service announcements aired.

DISCUSSION

Section 315(b) of the Communications Act directs broadcasters to charge legally qualified candidates for public office the "lowest unit charge" (LUC) of the station for the same class and amount of time for the same period during the 45 days preceding a primary election, and the 60 days preceding a general or special election. In adopting Section 315(b), Congress intended to decrease campaign expenditures by placing political advertisers on par with a station's "most favored commercial advertiser." S. Rep. No. 96, 92d Cong., 1st Sess., p. 27 (1971).

With respect to free time provided by a station to an advertiser, in *Darrel K. Burns*, 35 FCC 2d 663 (B/c Bur. 1972) (*"Burns"*), a radio station gave free announcements to "certain students and other individuals" because the station determined that these persons needed "just a little help." The Bureau specifically stated that:

> It does not appear that the "lowest unit charge" provision of Section 315(b) of the Communications Act of 1934, as amended, is applicable to situations where an advertiser is not charged an amount for any of his announcements.

Id.

The Bureau in *Burns* made clear that its ruling does not apply where a commercial advertiser receives free "bonus" spots based on the number or type of announcements it has purchased. *Id.* In this situation, the Commission requires that bonus spots provided to commercial advertisers be given a value and factored into the LUC for that class of time and time period. *Report and Order, Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1992).

In applying *Burns* to the KLEW anti-recessionary campaign, it appears that the announcements the station provided free of charge to the Lewiston and Clarkston Chambers of Commerce need not be considered in determining the station's lowest unit charge, as it does not appear that these announcements were provided in consideration for a schedule of paid announcements by a commercial advertiser.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 24, 1992

Released: June 25, 1992

Judy H. Hersher, Esq.
Downey, Brand, Seymour & Rohwer
555 Capitol Mall, 10th Floor
Sacramento, California 95814-4686

Dear Ms. Hersher:

This is in response to the "Verified and Notarized Request for Ruling and Clarification Regarding Application of the Equal Opportunities Doctrine Under...[47] USC Section...315(a) of the Federal Communications Act" (hereinafter "Request for Ruling"), which you filed on behalf of the California Democratic Party. Specifically, you request that the term "legally qualified candidate," as defined in Section 73.1940 of the Commission's rules, 47 C.F.R. Section 73.1940, be interpreted to include Bruce Herschensohn, a candidate for the Republican nomination for United States Senator in California, and a political commentator on KABC-TV and radio in Los Angeles.

You allege the following facts in support of your Request for Ruling. Mr. Herschensohn's political commentary on KABC-TV airs Monday through Thursday, usually during the 5:00 p.m. news broadcast; and on KABC Radio, Monday through Friday, between 8:15 and 8:50 a.m. Beginning on approximately June 11, 1991, a series of public announcements were made, and news stories appeared, regarding Mr. Herschensohn's anticipated candidacy for the Republican Senatorial nomination in California. Included were reports concerning endorsements of Mr. Herschensohn's candidacy by former California governor George Deukmejian and U.S. Representative Robert Dornan. Those reports also referenced Mr. Herschensohn's campaign committee, which had already been formed.

On June 21, 1991, California Democratic Party Chairperson Phil Angelides wrote to KABC General Manager Terry Crofoot, stating his belief that Mr. Herschensohn's continued appearance on the air triggered the equal time provisions of the Communications Act. Mr. Angelides expressed his concern that the station would be unable to maintain an objective reporting position if it continued to provide free air time to a publicly proclaimed candidate. Mr. Angelides therefore requested equal air time for the Democratic Party and/or the Democratic U.S. Senatorial candidates.[1] While KABC did not formally respond to the letter from Mr. Angelides, Mr. Crofoot previously had stated that Mr. Herschensohn would remain on the air until he became a formal candidate.

DISCUSSION

Section 73.1940(a) and (b) of the Commission's rules provides, in pertinent part, as follows:

> A legally qualified candidate for public office is any person who: (1) Has publicly announced his or her intention to run for nomination or office; (2) Is qualified under the applicable local, State or Federal law to hold the office for which he or she is a candidate; and (3)... Has qualified for a place on the ballot....

Upon becoming legally qualified, a candidate has a right to request equal opportunities with respect to the appearances of opposing legally qualified candidates for the same office, pursuant to Section 315(a).

You point out that Mr. Herschensohn has met the first two requirements of Section 73.1940 but not the third, in that he has not yet qualified for a place on the ballot under state law. In determining whether this third requirement has been met, the Commission looks to the laws of the state in which the election is held. *The Law of Political Broadcasting and Cablecasting: A Political Primer*, 100 FCC 2d 1476, 1480 (1984) (*"1984 Political Primer"*). Section 6490 of the California Elections Code, a copy of which is attached to your Request for Ruling as Exhibit D, provides that:

> No candidate's name shall be printed on the ballot to be used at the direct primary unless the following nomination documents are delivered for filing to the county clerk not less than 88 and not more than 113 days prior to the direct primary:
>
> (a) Declaration of candidacy pursuant to Section 6491.
>
> (b) Nomination papers signed by signers pursuant to Section 6494.

The county clerk shall not accept the nomination documents after 5 p.m. on the 88th day prior to the direct primary.

The Senatorial primary in California was scheduled for June 2, 1992, and therefore a candidate for Senate could have qualified for a place on the primary ballot between February 10 and March 6, 1992. As you correctly note, under Section 73.1940, Mr. Herschensohn could continue as an on-air political commentator on KABC-TV and radio until such time as he qualified for a place on the primary ballot, without triggering equal opportunities. You complain that, under this application of our rules, Mr. Herschensohn would have had more than seven months of "unfettered, free air time." In light of this allegedly unfair result, you ask the Commission to rule that the equal opportunities doctrine applies to on-air employees of television and radio stations who have publicly declared their candidacy, established a fundraising committee, and have the unique opportunity to use their free air time to convey their political beliefs.

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[1] Section 315(a) of the Communications Act, 47 U.S.C. Section 315(a), on its face makes clear that the right of equal opportunities is personal to a *candidate*, and not to a political party. Thus, a station need not entertain a request for equal opportunities for a political party. A request for equal opportunities by a political party on behalf of a candidate must name the candidate and be submitted with his or her express approval.

As an initial matter, we note that your Request for Ruling, while variously seeking an interpretation, clarification, and ruling with respect to Section 73.1940, in fact proposes a substantive change in that provision. As you recognize, Section 73.1940 on its face allows Mr. Herschensohn to continue as a political commentator on KABC until he has qualified for a place on the California primary ballot, without giving rise to equal opportunities. Because you take issue with this result, you indirectly ask that Section 73.1940 be modified to eliminate the requirement that a candidate, who is also an on-air employee of a broadcast station, must qualify for a place on the ballot under state law in order to be deemed "legally qualified" for purposes of Section 315(a).[2]

The proper procedural mechanism for modifying a Commission rule in the manner you describe is a petition for rule making, which would allow all interested parties an opportunity to respond to any proposed changes.[3] Because you have not filed a petition for rule making, but are instead seeking to indirectly change a well-established Commission rule, your Request for Ruling will be dismissed.[4] While we will not here rule on the substance of your arguments, we will provide some limited comments. First, we note that, even if the Commission were to modify its definition of a legally qualified candidate in the manner you suggest, it is well established that equal opportunities are only afforded to legally qualified candidates for the same office in the same election. *1984 Political Primer*, 100 FCC 2d at 1487-88. Section 315(a) specifically provides that equal opportunities shall be afforded "to all other such candidates for that office." In the case of a primary election, the Democratic nomination constitutes one office, and the Republican nomination constitutes a separate and distinct office. *See KWFT, Inc.*, 40 FCC 237 (1948). Thus, a Democratic candidate for U.S. Senate in California is entitled to equal opportunities with respect to appearances by a Republican candidate for the same seat only *after* the primary, and then only with respect to appearances by the Republican candidate who received the nomination. Thus, there is no precedent for your claim that the Democratic Party candidates are entitled to equal opportunities with respect to Mr. Herschensohn's appearances prior to the California primary election.

Second, in a previous case in which the definition of a legally qualified candidate was challenged, Senator Eugene McCarthy requested equal opportunities with respect to an appearance by then-President Lyndon Johnson in an hour-long interview conducted jointly by the three major television networks, even though President Johnson had not yet publicly announced his candidacy. The Commission denied Mr. McCarthy's request, and the U.S. Court of Appeals affirmed, reasoning that:

> The obvious difficulty in determining whether a likely public figure is a candidate within the intent of the statute justifies the Commission in promulgating a more or less absolute rule. If the application of such a rule more often than not produces a result which accords with political reality, its rational basis is established. But no rule in this sensitive area can be applied mechanically without, in some instances at least, resulting in unfairness and possible constitutional complications.

The Court then ruled that, considering the content and timing of the not unprecedented year-end interview with the President, the application of the Commission's rule did not produce an unreasonable result. *McCarthy v. FCC*, 12 R. R. 2d 2003 (D.C. Cir. 1968).

Finally, we note that the Commission recently adopted a comprehensive decision, pursuant to a notice and comment rule making, which codified and revised its political programming policies. *Report and Order, Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991). The objectives of this proceeding were to: (1) more accurately and closely reflect the language, intent, and requirements of the political broadcasting portions of the Communications Act; (2) issue detailed and practical advice, spelled out in clear and specific Commission rules; and (3) promote achievement of the Act's objectives while being responsive to the evolving sales practices of broadcast stations. This proceeding thus would have been an ideal mechanism for changing the definition of a legally qualified candidate should the Commission have felt that such a change was necessary. However, the Commission did not modify, propose to modify, or otherwise consider changing the definition of a legally qualified candidate in that proceeding.

Your Request for Ruling is hereby DISMISSED for the reason articulated above.

Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

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[2] You argue that the FCC has authority to change its interpretation of a statute by declaratory order, citing to *Chisholm v. FCC*, 538 F.2d 349 (D.C. Cir.) , *cert. denied*, 429 U.S. 890 (1976). At issue in *Chisholm* was an interpretation of Section 315 regarding the applicability of that statute to debates between candidates. In contrast, at issue here is a specific rule, not an interpretation of a statutory provision.

[3] *See* 47 C.F.R. Section 1.401. A petition for rule making must conform to certain procedural requirements, and must:

> [S]et forth the text or substance of the proposed rule, amendment, or rule to be repealed, together with all facts, views, arguments and data deemed to support the action requested, and shall indicate how the interests of petitioner will be affected.

Id. Statements by interested persons in support of or in opposition to a petition for rulemaking, and replies to such statements, are allowed under the Commission's rules. 47 C.F.R. Sections 1.403, 1.405. A petition that is "moot, premature, repetitive, frivolous, or which plainly [does] not warrant consideration," may be denied or dismissed by the Commission. 47 C.F.R. Sections 1.401(e), 1.407.

[4] Even if the rule defining a legally qualified candidate were modified pursuant to your Request for Ruling, such modification would be applied prospectively to ensure that licensees have an opportunity to comply. Thus, even if your Request for Ruling were granted, the relief you apparently seek - equal time for Mr. Herschensohn's prior appearances on KABC -- would not be forthcoming.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEFONICA LARGA DISTANCIA DE PUERTO RICO — File No. I-T-C-92-147

Application for authorization under Section 214 of the Communications Act of 1934, as amended, to provide international telecommunications services between the United States Virgin Islands and various international destinations

ORDER AND AUTHORIZATION

Adopted: June 29, 1992; **Released: July 7, 1992**

By the Chief, International Facilities Division:

1. The Commission has under consideration an application filed by Telefonica Larga Distancia de Puerto Rico ("TLD") requesting authority pursuant to Section 214 of the Communications Act of 1934, as amended, to provide international telecommunications services between the U.S. Virgin Islands and all destinations to which TLD is already authorized to provide service from Puerto Rico. TLD's application was placed on public notice and American Telephone and Telegraph Company ("AT&T") filed comments. TLD filed reply comments and AT&T responded thereto.

2. TLD hold several Commission authorizations to provide service from Puerto Rico to international locations. In the instant application, TLD requests authority to provide the same services to the same locations orginating from the U.S. Virgin Islands. TLD states that it will haul international traffic originating in the U.S. Virgin Islands to Puerto Rico using microwave facilities and then transmit the traffic to various international locations utilizing its existing facilities. TLD also proposes to resell the international switched voice services set forth in AT&T's Tariffs F.C.C. Nos. 13 and 14 between the U.S. Virgin Islands and the points listed in those tariffs. TLD notes that these are the same tariffs under which TLD provides resale traffic from Puerto Rico. TLD states that it is actively competing in the U.S. Virgin Islands equal access process and expects to commence services to international locations on July 15, 1992 (the equal access conversion date). TLD believes that its active participation in the equal access process will increase competition and lead to better services and more competitive prices for interexchange customers in the U.S. Virgin Islands.

3. AT&T's comments focus on the fact that TLD has on file with the Commission applications to transfer authority to provide international and domestic telecommunications services to a new corporation ("new TLD") in which Telefonica de Espana ("Telefonica"), the monopoly provider of telecommunication in Spain, will hold a substantial interest.[1] AT&T notes that if the instant application is granted, it will be transferred to the new TLD and will result in the new TLD providing service to and from the U.S. Virgin Islands in correspondence with its affiliate Telefonica in those countries in which Telefonica operates.[2] According to AT&T, such an arrangement raises significant foreign carrier affiliation concerns and broader policy issues presented in the TLD Joint Transfer Application proceeding and in CC Docket No. 91-360. Specifically, AT&T notes that any authorization that will be transferred to the new TLD must protect against the unfair leveraging of market power by foreign carrier affiliates of U.S. carriers to the detriment of U.S. interests, and, at the same time must advance the broader policy goal of securing more open foreign markets. Because of these concerns, AT&T requests that any authorization for TLD to provide international services to and from the U.S. Virgin Islands be subject to the Commission's decision in the Joint Transfer Application and in CC Docket No. 91-360. TLD acknowledges that authorization of the instant application will be subject to the Commission's decisions in those cases.

4. After consideration of the application and comments, we find that the public convenience and necessity require authorization of TLD to provide its authorized services between the U.S. Virgin Islands and various international locations on a facilities and resale basis. As noted above, TLD already provides services between Puerto Rico and all of the locations that it proposes to serve operating from the U.S. Virgin Islands. The entry of TLD into this market can be expected to increase service options, improve service quality and provide a downward pressure on rates. We do not believe it necessary to impose the conditions sought by AT&T at this time. This authorization is without prejudice as to any action the Commission may take on the Joint Transfer Application and in CC Docket No. 91-360 and TLD acknowledges that the instant authorization would be subject to the Commission's decisions in those cases. Moreover, in light of TLD's acknowledgement, AT&T states that its concerns have been satisfied.

5. Accordingly, IT IS ORDERED that the application File No. I-T-C-92-147, IS GRANTED and Telefonica Larga Distancia de Puerto Rico is authorized to:

a. lease and operate one T-1 channel (24 circuits) in AT&T's microwave facilities between Puerto Rico and Magens Bay, U.S. Virgin Islands for the provision of its regularly authorized services between the U.S. Virgin Islands and those international locations it is authorized to serve from Puerto Rico; and

b. provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariffs Nos. 13 and 14 between the U.S. Virgin Islands and the points listed in those tariffs.

6. IT IS FURTHER ORDERED that the applicant shall obtain any necessary operating agreements for each of the countries to which it will provide service and shall file them with the Commission within thirty days of their execution.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. §203, and Part 61 of the Commission's Rules, 47 C.F.R., Part 61 for the services authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall submit semi-annual circuit addition reports pursuant to Section 63.10 of the Commission's Rules, 47 C.F.R. §63.10.

9. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] *See* Applications File Nos. I-T-C-92-116 and I-T-C-92-121 (hereinafter referred to as "Joint Transfer Applications").

[2] In addition to providing telecommunications services in Spain, AT&T notes that Telefonica also holds ownership interest in carrier affiliates in Argentin, Chile and Venezuela.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

VALLEY BROADCASTING, INC. File No. BPFTB-890428TA

For Construction Permit for a New
FM Booster Station on Channel 279
in Omaha, Nebraska

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1992; Released: July 8, 1992

By the Audio Services Division

1. Before the Division is the above-captioned application of Valley Broadcasting, Inc. ("Valley"), licensee of FM Station KXKT, Atlantic, Iowa; petitions to dismiss or deny the application filed by Webster Communications Company ("Webster"), licensee of FM Station KEFM, Omaha, Nebraska, and Mitchell Broadcasting Co. of Iowa, Inc. ("Mitchell"), licensee of Station KQKQ-FM, Council Bluffs, Iowa; petition for reconsideration filed by Webster; Emergency Application for Review filed by Webster; and related pleadings and submissions.

BACKGROUND

2. The above-captioned application for a new FM booster station to serve Omaha, Nebraska, was filed by Valley on April 28, 1989. Valley seeks to rebroadcast the signal of KXKT (formerly KOMJ) in order to overcome destructive intermediate frequency ("IF") interference to the KXKT signal resulting from the co-location of Stations KQKQ-FM, and WOWT-TV, Omaha, Nebraska. On May 19, 1989, Valley requested Special Temporary Authority ("STA") to immediately commence operation of the proposed FM booster station in order to overcome the effects of the IF interference experienced by the KXKT signal.

3. On June 14 1989, Webster filed an objection to the request for special temporary authority and a petition to dismiss or deny. Webster alleged that Valley failed to establish the existence of widespread IF interference which would necessitate the need for a booster station, and that the IF interference which does exist is minor. It alleged further that the proposal represented an inappropriate use of a booster station because such stations may only be used to overcome distance and/or terrain induced signal blockage; that Valley's proposal was technically unfeasible because it would result in massive mutual interference to KXKT; and that operation of the proposed station would subject KEFM to a "grave threat of interference." With respect to the STA, Webster argued that it should not be granted because it improperly proposed new service as opposed to a continuation of existing service.

4. On July 3, 1989, Mitchell also filed an objection to the request for special temporary authority and a petition to dismiss or deny. Therein, Mitchell supported Webster's arguments. It further contended that the potential IF interference to KXKT was not as serious as suggested by Valley. Mitchell also argued that Valley's application did not contain data regarding the vertical radiation component of the proposed antenna system, and that, contrary to the provisions of 47 CFR § 74.1235(c), the booster's 1 mV/m contour may therefore extend beyond KXKT's 1 mV/m contour and exceed KXKT's power by more than 20%.[1]

5. By letter dated June 12, 1991, we denied, in part, the petitions and objections of Webster and Mitchell. We deferred action on the petitions and Valley's application as they pertained to the pending interference allegations concerning KEFM. To this end, we granted Valley's STA request as a Special Field Test Authorization ("SFTA") to allow Valley to determine the effects of the proposed booster station's operation on KEFM.

6. By our action of June 12, we found that Valley's application, as amended, complied with the engineering requirements of our booster rules. We also found the remaining allegations that were raised were without merit. Based on the record, we first determined that a clear necessity for the proposed booster station existed. We concluded that Valley was in fact experiencing reception problems within its 1 mV/m contour and that a fill-in booster station would alleviate this problem. We also concluded that the cause of such interference or reception problems was not determinative, but that a justifiable technical need for the booster existed.

7. We further found that the booster station was being used for a legitimate purpose. We determined that Webster's allegation of inappropriate use was inconsistent with the genesis of the FM booster service, which is to provide fill-in service to the public in situations where the primary station's signal cannot be satisfactorily received within its 1 mV/m contour. We therefore found in view of the established legitimate need for the booster station, that such stations are not limited to being authorized only in instances of terrain obstructions or distance.

8. In addressing the allegations of mutual interference as to KXKT, we found the provisions of § 74.1203(c) to be controlling. We concluded that the proposal complied with the provisions of the rule, which permits a booster station to cause interference to its primary station, provided that it does not disrupt the primary station's existing service or cause interference to the primary station's signal within the boundaries of its principal community of license.[2] We found that the petitioners did not allege or establish that the booster would disrupt or cause interference to KXKT within its principal community of license, Atlantic, Iowa. Furthermore, pursuant to the Commission's 1987 Booster *Report and Order* in MM Docket No. 87-13, 2 FCC Rcd 4625; *amended*, 6 FCC Rcd 6060 (1991), we concluded that Valley is in the best position to determine the appropriate balance between increased coverage

[1] Pursuant to our request of April 9, 1990, Valley amended its application on April 27, 1990, demonstrating compliance with § 74.1235(c).

[2] The rule was slightly revised in our Translator *Report and Order*, which became effective on June 1, 1991. *Order* in MM Docket No. 88-140, 6 FCC Rcd 2334 (1991). The revision has no bearing on the question under review.

from the booster and any mutual interference. In reaching this conclusion, we recognized that licensees have a clear incentive to avoid such interference to areas served by their primary station.

9. Although the applicant had fully met the requirements for authorizing booster stations,[3] the possibility of interference resulting to KEFM once the booster station was operating remained at issue. Because FM booster stations, which operate as a secondary service, are prohibited by the provisions of 47 CFR § 74.1203 from causing interference, we determined that an appropriate and practical means for resolving this question was to allow Valley to operate under an SFTA for a period of 30 days. We believed that this limited test operation would conclusively answer the question of whether operation of the booster would result in interference to the signal of KEFM.

10. On June 26, 1991, Webster responded to our June 12 action by filing a request for stay of the SFTA. As the basis for the stay, Webster reiterated the arguments previously advanced by its petition to dismiss or deny Valley's application. In view of the limited operation permitted by the terms of the SFTA, we concluded that Webster would not suffer irreparable harm as a result of operation pursuant to the SFTA.[4] Accordingly, the request for stay was denied on September 20, 1991. Webster subsequently filed an Emergency Application for Review of the denial of the stay.

Petition for Reconsideration

11. On July 12, 1991, Webster also filed a petition for reconsideration. Webster raises two central arguments. First, it contends that the allegations of mutual interference to KXKT were not fully evaluated and that the applicable provisions of § 74.1203(c) were misconstrued. Second, Webster reiterates that Valley has specified an inappropriate use for a booster station.

12. Webster argues that we only focused on mutual interference to the KXKT signal within Atlantic, and thereby failed to fully evaluate its arguments regarding interference to the KXKT signal outside of the station's principal community. In that regard, Webster, even accepting Valley's engineering data, claims that mutual interference will occur to 373,999 people in a 763 square kilometer area. Webster concludes that our action of June 12 "violates basic standards of due process and constitutes reversible error." Webster maintains that the staff misconstrued the provisions of 47 CFR § 74.1203(c). It alleges that the plain and intended meaning of the section is to proscribe booster-created interference to the main station signal both inside and outside the primary station's community of license. Webster asserts that booster and translator stations have been authorized only on a non-interference basis, whether to the primary station, the booster, or to other stations.[5] Therefore, it contends that it was incorrect to find that the proposed booster could be granted even though it would cause interference to its primary station's signal, albeit outside the primary station's community of license.

13. At the outset of our examination of this issue, we note that although the provisions of § 74.1203(a) require the authorization of booster stations on a non-interference basis, § 74.1203(c) exempts FM booster stations from these provisions to the extent that such stations may cause limited interference to its primary station, provided it does not disrupt the primary station's existing service or cause interference to the primary station within its principal community of license. This exception governs the instant situation and Webster's reliance on § 74.1203(a) and the Translator *Report and Order* as a bar to Valley's application is inapposite.

14. In continuing our examination, there is no dispute regarding the lack of interference to KXKT's signal within KXKT's principal community of Atlantic. Webster's concern is with the extent of mutual interference outside of Atlantic. In this regard, § 74.1203(c) permits mutual interference to the primary station outside of the station's principal community, provided that it does not disrupt the existing service of the primary station. With respect to the disruption of the primary station's existing service, the Commission's 1987 *Report and Order, supra,* is clear:

> [w]e believe that the licensee is in the best position to determine the appropriate balance between increased coverage from the booster station and increased interference ... and there is adequate incentive for licensees to seek to avoid interference to areas served by their primary station's signal. Therefore, we will leave judgments regarding interference to the primary station caused by its co-owned booster facilities to the licensee.... It is our intention that boosters not disrupt the existing service of the primary stations and in this context we expect licensees to be diligent in their efforts to maintain their stations' existing service when introducing new booster facilities.

Id. at 4629.

15. The Commission has thus afforded the licensee broad discretion in determining the acceptable degree of interference to its existing service. We recognized this factor in our June 12 action when we referred to the 1987 Booster *Report and Order,* and determined that the ap-

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[3] An FM booster station will be authorized for fill-in purposes only and must demonstrate compliance with several provisions of the Commission's Rules. These include (but are not limited to) the following: the predicted service contour of the booster station may not extend beyond the predicted service contour of the primary station; the effective radiated power ("ERP") of the booster station must be limited to 20 percent of the maximum permissible ERP of the class of the primary station being rebroadcast; and the booster station's transmitter may not be co-located with the transmitter of the primary station. Our analysis found that Valley had demonstrated compliance with all relevant technical requirements. Thus, no technical impediment existed which warranted denial of Valley's application.

[4] Other factors present also did not warrant a stay of the test. A request for stay will only be granted where the following four part test has been successfully demonstrated: likelihood that the moving party will prevail on the merits of its appeal; the likelihood that the moving party will be irreparably harmed absent a stay; the prospect that others will be harmed, if the stay is granted; and the public interest in granting the stay. *Wisconsin Gas Co. v. FERC,* 758 F.2d 669, 673-674 (D.C. Cir 1985); *Virginia Petroleum Jobbers Ass'n v. FPC,* 259 F.2d 921, 925 (D.C. Cir. 1958) .

[5] Webster supports this position citing the Commission's 1970 *Report and Order,* in Docket No. 17159, 20 RR 2d 1538, 1540 (1970), and the *Report and Order* in MM Docket No. 88-140, 5 FCC Rcd 7212, 7230, (1990) ("Translator *Report and Order*"); *modified,* 6 FCC Rcd 2334 (1991).

plication complied with the provisions of § 74.1203(c). While the number of persons and the area affected by the interference would in itself seem to indicate a significant disruption, Valley has acknowledged its responsibility in this matter, and has indicated that it will take affirmative steps to insure that such interference will be minimized by the use of a digital delay device. Moreover, to the extent that Valley fails to adequately minimize the disruption, the provisions of § 74.1203 (a) and (b) would prohibit continued operation of the booster until the interference causing the disruption is eliminated. As such, Webster's claims that its mutual interference allegations were not fully addressed and that the provisions of § 74.1203(c) were misapplied below are without merit and are inconsistent with the Commission's pronouncements in this area.

16. The final argument advanced by Webster in its petition for reconsideration is that the proposed use of the booster is expressly prohibited by the Commission and, consequently, the staff action permitting such use exceeded the Bureau's delegated authority. Relying on the Commission's 1970 *Report and Order, supra* at 1540, and to a lesser extent the Translator *Report and Order, supra* at 7213, Webster argues that translators and booster stations were originally authorized for the purpose of "filling in" gaps in existing service created by distance or terrain irregularities. Because Valley proposes the booster to overcome IF interference, and not service gaps resulting from distance or terrain irregularities, Webster concludes that the proposed use is outside the scope of the authority the Commission has granted to the Bureau pursuant to its translator and booster station report and orders.

17. The Commission's clear intent for FM booster stations is that they be used for fill-in purposes. The need for fill-in service can arise for reasons other than terrain obstructions or distance. Although the Commission referred to terrain obstructions in its 1987 Booster *Report and Order* cited by Webster, the Commission did not limit booster authorizations only to situations where terrain obstructions were advanced by the applicant. In fact, the main thrust of the 1987 Booster *Report and Order* was to expand the opportunities to utilize FM booster stations without altering the fundamental nature or purpose of boosters as fill-in facilities. In the 1987 Booster *Report and Order, supra* at page 4625, the Commission stated that rules established by the *Report and Order* would "limit the operation of FM booster stations *only* to the extent that they may not extend service beyond their primary station's 1 mV/m predicted contour ...." (emphasis added). Moreover, the Commission stated that the booster rules were modified in order to provide an expanded use for FM booster stations and to fulfill its "intent to permit licensees to use booster facilities as a spectrum-efficient means to deliver signals to the audiences they are licensed to serve." *Id.* at 4628.

18. Section 74.1231(h) provides, in pertinent part, that "FM broadcast booster stations provide a means whereby the licensee of an FM broadcast station may provide service to areas in any region within the primary station's predicted authorized service contours." The interference experienced by KXKT impairs KXKT's signal and its elimination is consistent with the stated broad purpose for which FM booster stations are appropriate. Accordingly, we correctly concluded that Valley proposed the use of the booster station for acceptable purposes. Our action was consistent with the expanded opportunities established by the Commission for FM booster stations.

Application for Review

19. On September 20, 1991, the same day that we denied Webster's request for a stay of the SFTA, Webster filed an Emergency Application for Review of that action. Previously, Valley had withheld implementation of the SFTA during the pendency of Webster's request for stay. However, subsequent to our action denying the stay and during the pendency of Webster's Emergency Application for Review, Valley, Webster and Mitchell reached an agreement whereby the SFTA would be implemented as an interference test. The testing took place between September 27, 1991 and October 22, 1991. Since the action for which the stay was filed has taken place, Webster's Emergency Application for Review is moot.

SFTA Results

20. The remaining issue before us concerns Webster and Mitchell's allegations that the proposed booster will cause interference to the operation of full service FM stations. The tests were performed by Calhoun Communications, Inc. ("Calhoun"), a neutral third party selected by the parties. The test sites included five mobile routes selected by Webster and five selected by Mitchell. Each route was travelled twice, once with the booster operating and once with the booster off. Observations were made at all sites with one automobile receiver. In addition to the mobile sites, the test sites also included seven stationary locations selected by Webster and seven by Mitchell. Observations at the stationary sites were made with four different receivers at each location, once with the booster operating and again with the booster off. During testing at Webster's sites, all receivers were tuned to KEFM. During testing at Mitchell's sites, all receivers were tuned to KQKQ-FM. An audio recording was made during each observation.

21. Calhoun filed the results of the test with the Commission on November 29, 1991. No interference was observed with respect to the KQKQ-FM signal at any of the test locations. Also, there were no reports of interference complaints from either KQKQ-FM or KEFM listeners. Interference to the KEFM signal was detected at one stationary site. However, the interference was heard on only one of the four receivers used. Moreover, even when the booster was off, reception of the KEFM signal continued to be extremely poor due to existing interference from numerous other transmitters located at the Crown Point antenna farm nearby to where the test was conducted.[6] Interference was also observed during one of the mobile tests, with the interference being detected during a short segment of the test conducted in an area close to the Crown Point antenna farm. With the test vehicle stopped, the severity of the interference to KEFM's reception on the single test receiver did not subside until the booster's power level was reduced to 10% of its original power.

[6] Three television stations and 10 FM stations, including KQKQ-FM and the proposed booster station, transmit from the Crown Point antenna farm.

22. All three parties commented on the test results. Valley concludes, based on the paucity of interference and the lack of listener complaints after some 40 hours of operation, that Webster's allegation of interference is unfounded and that operation of the booster is feasible. It notes that any interference detected occurred in either unpopulated areas or areas already experiencing interference. Webster counters that the severity of the interference at the mobile site prohibits authorization of the facilities, that the lack of interference at other sites is not controlling, since the test sites were just a sampling of locations, and that it detected interference at a site close to one of the test locations. Webster and Mitchell both observed mutual interference to the KXKT signal during the testing, and Mitchell concludes that the proposal will need to be amended and retested before it can conclusively determine the effects of the operation proposed by the booster.

23. Section 74.1203(a) provides that a booster station will not be permitted to continue operation where its operation will result in actual interference to the direct reception by the public to the off-the-air signal of an authorized broadcast station. The rule further provides that: "[i]nterference will be considered to occur whenever reception of a regularly used signal is impaired by the signals radiated by the... booster station, regardless of the quality of such reception...." We conclude that the booster would not cause interference to the regularly received signal of KEFM.

24. Valley has indicated that the area where this interference has occurred is an unpopulated area. This fact is bolstered by the lack of listener interference complaints during the booster's temporary operation. One component of § 74.1203(a) provides that the interference must result to the "direct reception by the public" (*i.e.*, listeners). Thus, listener complaints would have to accompany any claim of interference before operation of the booster station would have to be terminated.

25. Webster has not demonstrated that the area in question is in fact populated. Instead, it attempts to demonstrate that a nearby populated area, not included as a test site, might experience interference. It further attempts to invalidate the test sites as not conclusively demonstrating the existence of interference to the KEFM signal. However, inasmuch as the site where the interference occurred is unpopulated and the booster's operation did not result in a single listener complaint, Valley's proposed booster application will be granted. We are unconvinced by Webster's efforts to denigrate the legitimacy of the test sites, especially in view of its role in selecting the sites, and its failure to alert Valley of the interference it detected in close proximity to a test site.

26. Although we are granting this construction permit application, we emphasize that, pursuant to the provisions of § 74.1203(a), if the booster's operation causes actual interference to KEFM's regularly used signal and results in listener interference complaints, Valley will be required to discontinue operation until all complaints have been resolved. To this end, Valley is aware of its responsibilities under the rule and has pledged to comply with the attendant provisions. Accordingly, the KEFM interference allegations raised by the Webster and Mitchell petitions will be denied.

27. In view of the foregoing, IT IS ORDERED that the petitions to deny or dismiss filed by Webster Communications Company and Mitchell Broadcasting Company of Iowa, Inc. ARE DENIED; the petition for reconsideration filed by Webster Communications Company IS DENIED, that the Emergency Application for Review filed by Webster Communications Company IS DISMISSED as moot, and that the application for a new FM booster station to serve Omaha, Nebraska (File No. BPFTB-890428TA) filed by Valley Broadcasting, Inc. IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Larry D. Eads, Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: June 16, 1992

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON AMERITECH REQUEST FOR EXPEDITED APPROVAL OF A NEW ONA BASIC SERVICE ELEMENT (BSE)

On April 16, 1992, Ameritech filed a request for expedited approval of a new SS7-based basic service element (BSE) called "delivery of the Initial Address Message (IAM)." The normal 45-day approval period has been extended to permit comment on Ameritech's request.

Interested parties should file comments on the request by **June 26, 1992**, and reply comments by **July 2, 1992**, with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Mark S. Nadel, Common Carrier Bureau, FCC, Room 544, 1919 M St., N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: Downtown Copy Center, 1114 21st Street, N.W., Washington, D.C. 20036. Copies of the petitions can be obtained from the Downtown Copy Center at (202) 452-1422. Ameritech's request is also available for public inspection and duplication at Room 544, 1919 M Street, N.W., Washington, D.C.

We will treat this proceeding as non-restricted for purposes of the Commission's *ex parte* rules. *See generally*, 47 C.F.R. §§ 1.1200-1.1216. For further information contact Mark Nadel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-6363.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies Tariff F.C.C. No. 1 — Transmittal Nos. 506, 512

ORDER

Adopted: June 29, 1992; Released: June 30, 1992

By the Acting Deputy Chief (Policy), Common Carrier Bureau:

1. On April 2, 1992, the Bell Atlantic Telephone Companies filed Transmittal No. 506 [1] to restructure its Digital Data Service (DDS) and DS1 High Capacity Special Access Services.[2] Currently, Bell Atlantic's DDS and DS1 Special Access Services are offered on a month-to-month basis; customers pay a fixed mileage charge and a per mile charge for each channel termination. Bell Atlantic proposes to restructure the service to require that a customer subscribe to the monthly offering for a two-month minimum period, and to provide for subscription term plans of two, three or five years. D&J at 1-2. Transmittal 506 is scheduled to take effect July 2, 1992.

2. Metropolitan Fiber Systems, Inc. (MFS) and Eastern Telelogic Corporation (ETC), filed petitions to reject or, alternatively, to suspend and investigate Transmittal 506.[3] MFS contends that the termination liability rates for the channel termination segments of DDS and DS1 traffic cannot recover Bell Atlantic's costs, based on MFS' comparision of similar rates charged by other Bell Operating Companies (BOCs), and that the rates therefore are predatory. MFS Petition at 3-5. MFS also argues that the termination liability rates discriminatorily favor large interexchange carriers. *Id.* at 7-8. ETC contends that the term pricing discriminates by charging lower rates for the same service. ETC Petition at 3-5. It also maintains that term pricing plans are anticompetitive because customers are deferring purchase decisions while the revisions are pending. *Id.* at 12.

3. Bell Atlantic replies that differences in rates among BOCs do not constitute prima facie evidence of unlawfulness and that, in any event, MFS's comparison of BOC rates is inaccurate because it does not compare similar data.[4] Bell Atlantic observes that the Commission requires only that the plan generates adequate revenue to cover costs, as the proposed plan would. *Id.* at 8. Bell Atlantic disputes claims of discrimination, arguing that the proposed rate reductions will result in a greater termination liability for channel mileage service, and that pro rata calculations would be unreasonably burdensome. *Id.* at 7-8. Finally, Bell Atlantic asserts that ETC's claim that term pricing is discriminatory lacks merit inasmuch as several term pricing plans have withstood Commission review, *id.* at 4-5, and that ETC is free to adopt such pricing plans. *Id.* at 3.

4. The Common Carrier Bureau has reviewed Transmittal Nos. 506 and 512, and all associated pleadings and petitions. We conclude that no compelling argument has been presented that the tariff revisions are so patently unlawful as to require rejection, and that no question has been presented that warrants investigation at this time.

5. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate Bell Atlantic Tariff F.C.C. No. 1, Transmittal No. 506, filed by Metropolitan Fiber Systems, Inc. and Eastern Telelogic Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Acting Deputy Chief (Policy),
Common Carrier Bureau

[1] Bell Atlantic also filed Transmittal No. 512, to become effective on July 2, to revise one provision contained in Transmittal No. 506.

[2] Bell Atlantic Telephone Companies, Transmittal No. 506, Description and Justification (D&J), filed April 2, 1992.

[3] Metropolitan Fiber Systems, Inc., Petition to Reject, or Alternatively, Suspend and Investigate Proposed Tariff Revisions, filed April 27, 1992; Eastern Telelogic Corporation, Petition to Reject or Alternatively to Suspend and Investigate, filed April 27, 1992.

[4] Reply of Bell Atlantic to Petitions to Reject or Suspend and Investigate, filed May 11, 1992, at 6.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
June 29, 1992

Released: July 8, 1992

Mr. James L. Zix
General Manager
The Indiana District of the Lutheran
Church-Missouri Synod, Inc.
Licensee, Noncommercial Station WLAB(FM)
6600 N. Clinton Street
Fort Wayne, Indiana 46825

Dear Mr. Zix:

This is in further reference to the Commission's inquiry regarding the enhanced underwriting practices of station WLAB(FM), Fort Wayne, Indiana. We inquired into a number of announcements aired by the station, from December 1991 to February 1992, in which station personnel either urged listeners to visit the place of business where a WLAB remote broadcast was taking place, or mentioned that products were available at the store."

On April 3, 1992, you responded that, although each of the remote broadcasts originated at the venue of a current underwriter, the station's decision to broadcast at those locations was unrelated to each entity's underwriting status. For example, you state that, although the Ft. Wayne Sports, Vacation and Boat Show is a station underwriter, WLAB was invited by a non-profit entity, rather than the underwriter, to share its booth there. With respect to the Family Bookstore remote broadcast, you state that the remote was non-promotional in nature, and that, in any event, WLAB was not motivated by possible consideration in that Family Bookstore is seriously delinquent in its payments. You acknowledge that during WLAB's remote from underwriter Jericho Music and More, store personnel and members of a band did mention that products were available at the store, but that the station took immediate corrective action to prevent this type of announcement from recurring. Again, you stress that the Jericho Music remote was conducted in support of two non-profit ministries, and was not motivated by consideration.

Under Section 399B of the Communications Act of 1934, as amended, a public broadcaster cannot promote an individual's or entity's goods, services or activities where the broadcaster receives or reasonably anticipates the receipt of consideration from such individual or entity (other than a nonprofit organization). 47 U.S.C. Section 399B. Live remote broadcasts are permissible under Section 399B. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations,* 86 FCC 2d 141, 153 (1981)("Second Report and Order"). As long as the programming is based on the licensee's public interest judgment rather than an exchange of consideration, an announcement identifying the origination point of the broadcast would raise no question. *Id.* However, the Commission has also stated that "obvious promotion of an event and/or establishment" could raise factual questions as to consideration between the establishment and the licensee. *Id.* In this context, the contribution of programming funds is consideration. *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Station,* 90 FCC 2d 895, 906 n.26 (1982)("1982 Order"). Specifically, making an establishment available in exchange for on-air promotion beyond that reasonably related to the production of the program would constitute consideration. *Id.; 1982 Order* at 908 n.33.

We find that each of these announcements does not merely identify, but actually urges listeners to patronize a commercial entity where the remote is taking place, constituting a prohibited "call to action." *Commission Policy Concerning the Noncommercial Nature of Educational Broadcasting Stations,* 7 FCC Rcd 827, 828 (1991)("1986 Public Notice"). Despite your assurances that WLAB received no direct remuneration from any of these entities for the remote broadcasts, the combined effect of urging listeners to visit the place of business (as opposed to merely identifying it), and the possibility of future funds (even from the delinquent underwriter) is, whether or not intended, to promote patronage of a commercial entity.

In view of the above, it appears that station WLAB(FM), Fort Wayne, Indiana, violated Section 399B of the Communications Act, Section 73.503(d) of the Commission's Rules, and related policies concerning enhanced underwriting announcements. WLAB is hereby admonished for the violations described above. You are cautioned that future violations may result in more severe sanctions, including monetary forfeitures.

Sincerely,

Edythe Wise, Chief
Complaints and Investigations Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

JEM BROADCASTING COMPANY, INC. File No. BPH-880714NT

For a Construction Permit for a
New FM Station on Channel 293C2
in Bella Vista, Arkansas

MEMORANDUM OPINION AND ORDER

Adopted: June 24, 1992; Released: July 9, 1992

By the Commission:

1. Commission has under consideration a petition for reconsideration filed October 9, 1990, on behalf of JEM Broadcasting Company, Inc. ("JEM").[1] JEM seeks review of the Mass Media Bureau's ("Bureau") action dismissing its application for a construction permit (FCC Form 301) for a new, commercial FM station in Bella Vista, Arkansas. *See Gayla Joy Hendren, (Hearing Designation Order)* 5 FCC Rcd 5440 (M.M. Bur. 1990). JEM's petition for reconsideration has been referred to the Commission pursuant to 47 C.F.R. § 1.104(b).

2. *Background.* JEM's application for the Bella Vista facility was accepted for tender on November 16, 1988, triggering a 30-day period for JEM to file curative amendments affecting the acceptability or grantability of the application, including amendments pertaining to its geographic coordinates. *See* 47 C.F.R. § 73.3522(a)(6). Two amendments, neither of which is germane to this discussion, were filed during this period. Thereafter, JEM's application was reviewed for acceptability. Staff review revealed that the geographic coordinates for the proposed transmitter site listed in Section V-B, Item 2(b) of JEM's application conflicted with the coordinates for the site as plotted on the topographic site map.[2] Consequently, the application was dismissed as inadvertently accepted for filing.[3]

3. *Petition for Reconsideration.* JEM's petition does not dispute the staff's finding of a coordinate discrepancy. Rather, JEM concedes that there is a discrepancy between the coordinates listed in Section V-B of its application and those shown on its transmitter site map. However, JEM argues that its application contains "a plethora of information concerning its proposed site all of which [except the typographically incorrect response to Section V-B, Item 2(b)] corresponds to the location depicted in its site map ...." Petition at 3-4. JEM cites Appendix D of the *Report and Order* in M.M. Docket No. 84-750, 50 Fed. Reg. 19936 (May 13, 1985) ("*Report and Order*") and the Commission policy therein stipulating that when a defect is present, the Commission will attempt to derive the needed information or resolve any discrepancy from the application as a whole.[4] JEM contends that the staff failed to apply the procedures described in Appendix D of the *Report and Order* to resolve the coordinate discrepancy based on JEM's application as a whole. Specifically, JEM argues that the staff could have confidently and reliably concluded through the use of various pieces of information contained in its application, and which involve at least seven separate engineering analyses, that JEM's site map correctly depicts JEM's intended site location, thereby favorably resolving the discrepancy in accordance with the procedures set forth in Appendix D.

4. JEM further argues that it is the victim of arbitrary and capricious, disparate treatment citing *Melody Music, Inc. v. FCC*, 345 F2d 730 (D.C. Cir. 1965). Although the Commission stated in Appendix D that the information necessary to resolve a discrepancy must be drawn from the application as a whole, JEM argues that the Commission has repeatedly gone beyond the Appendix D guidelines by referencing information contained within the Commission's own records to resolve other coordinate discrepancies. As precedent for this practice, JEM cites the

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[1] A timely opposition to JEM's pleading was filed by Gayla Joy Hendren ("Hendren"), a party to the Bella Vista, Arkansas proceeding. An untimely reply to Hendren's opposition was filed by JEM which has been considered.

[2] JEM specified coordinates of $36^0 13'10"$ N.L., $94^0 25'00"$ W.L. in Section V-B of its application, whereas the plotted coordinates on the site map were $36^0 15'10"$ N.L., $94^0 25'00"$ W.L., representing a difference of 3.7 km (2.3 miles).

[3] In a *Memorandum Opinion and Order* released April 17, 1991, the presiding Administrative Law Judge in the Bella Vista comparative hearing proceeding (MM Docket 90-376) granted one of the two remaining applications.

[4] Paragraph 4 of Appendix D of the *Report and Order* states, in pertinent part:

> Compliance with the Commission's technical rules is evaluated in the course of an acceptability study. Certain engineering data must be present for such a technical acceptability study to be made. The absence of one or more elements of those data, listed below, prevents a determination of acceptability and thus renders the application not substantially complete.
>
> a. The geographic coordinates, to the nearest second, of the proposed transmitter site must be provided...
>
> If any of the above information is present but, on the face of the application, visibly incorrect or inconsistent, the application will be treated in accordance with the following guidelines. If the needed information can be derived or the discrepancy resolved, confidently and reliably, drawing on the application as a whole, such defect will not render the application not sufficient for tender. However, if the critical data cannot be derived or the inconsistency resolved within the confines of the application and with a high degree of confidence, the presence of the clearly void data will be treated as functionally equivalent to the absence of such data.

50 Fed. Reg. at 19946.

scenario of an applicant who proposes to use an existing tower, and whose application contains a discrepancy between the listed coordinates and the coordinates plotted on the site map. Confronted with such a situation, the Commission willingly looks beyond the four corners of the actual application to resolve the coordinate discrepancy. In the instant case, however, JEM asserts that the Commission failed to use information within its records to resolve the discrepancy between the two sets of coordinates. Specifically, JEM contends that, following its submission of FAA Form 7460-1, Notice of Proposed Construction or Alteration, to the FAA, the Commission could have employed the coordinates plotted on JEM's site map to access Commission records and determine that on August 25, 1988, the FAA had approved JEM's proposed new tower at the site map coordinates. Conversely, JEM argues that referencing Commission records via the coordinates listed in response to V-B, Item 2(b) would have rendered no FAA record of an approved tower at that location. JEM asserts that if the Commission is going to rely on its own records to resolve discrepancies for some applications, it must do so for all applications which contain sufficient information to enable the Commission to reference its own records to resolve a discrepancy. JEM therefore concludes that the dismissal of its application constitutes arbitrary and capricious, disparate treatment, and requests that the *Hearing Designation Order*, in which dismissal of its application was ordered, be reconsidered and its application reinstated for hearing with the other mutually exclusive applications for the new FM facility in Bella Vista, Arkansas.

5. *Discussion*. The Commission has consistently affirmed the Bureau's dismissal of applications containing inconsistent geographic coordinates for an applicant's proposed transmitter site. *See R. Donnie Goodale*, 7 FCC Rcd 1495 (1992); *Steven B. Courts*, 4 FCC Rcd 4764 (1989); *Benjamin Macwan*, 4 FCC Rcd 4769 (1989); *R.A.D. Broadcasting Corp.*, 4 FCC Rcd (1989); *Nicholasville Broadcasting Company*, 4 FCC Rcd 2574 (1989). As we stated in the *Report and Order*, which established our FM "hard look" processing standards, an accurate showing of the geographic coordinates is necessary to an acceptability determination.[5] *See* 50 Fed. Reg. at 19945.[6]

6. With respect to JEM's specific arguments, we note first that, in this case, the staff technically was not required to apply the guidelines in Appendix D concerning the resolution of discrepancies in information supplied in applications, since those guidelines were designed to apply to tenderability defects, and the coordinate discrepancy at issue in this case is an acceptability defect. *Steven B. Courts*, 4 FCC Rcd at 4767, n. 3. Nevertheless, it is basic FM processing policy to attempt, within reason, to resolve all discrepancies found in applications. *Benjamin Macwan*, 4 FCC Rcd at 4771, n. 3.[7]

7. JEM's application does not involve a conventional coordinate discrepancy - between two stated sets of coordinates listed within the application form or related exhibits - but instead a discrepancy between a set of coordinates listed in Section V-B and a set of coordinates the staff discerned from the site plotted on the site map. Only one set of coordinates was supplied by the applicant. JEM never provided a second stated set of coordinates within the application. Moreover, the single set of coordinates listed within the application have now been declared incorrect by the petitioner. This omission of a second stated set of coordinates further impeded the staff's ability to determine which set of coordinates were intended by the applicant. JEM's original application, therefore, becomes functionally equivalent to an application with no coordinates listed, only an "x" on a map.

8. JEM's primary argument, that the discrepancy may be resolved through the use of the other engineering analyses contained in its petition is unpersuasive. When conflicting sites are specified, we are left with the question of which site, if either, depicts the site intended by the applicant. The question also arises, for which site, if either, was reasonable assurance obtained and the environmental statement prepared? The petitioner would have us conclude that if its engineering exhibits can be demonstrated to correspond to the plotted site, then the plotted site must be the "correct" site. However, it does not matter which site was used in preparing the engineering exhibits if that site was not the site for which reasonable assurance was obtained and the environmental statement prepared. The applicant's certification of reasonable assurance in Section VI of the application refers to the "the site or structure proposed in Section V of this form." Yet, the coordinates listed in Section V do not correspond to those shown on the site map, Engineering Exhibit Figure 2. The environmental statement, Engineering Exhibit Figure 4, contains no additional information which would resolve the coordinate discrepancy.

9. The petitioner asserts that the source of the discrepancy is a typographical error in Section V-B. Equally plausible, however, would be either a plotting error or a typographical error in entering the intended coordinates into the computer used to generate the applicant's technical studies. If the error lies in the plotted site, then

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[5] In a recent Notice of Proposed Rule Making in MM Docket No. 91-347, we proposed to modify or eliminate the FM "hard look" processing rules, but stated that any such change would only apply to applications filed after the effective date of the rule changes. *Amendment of Part 73 of the Commission's Rules to Modify Processing Procedures for Commercial FM Broadcast Applications*, 6 FCC Rcd 7265 (1991).

[6] The geographic coordinates, to the nearest second, of the proposed transmitter site are critical to processing the application. If the staff is unable to determine the location of the proposed transmitter site because of a discrepancy between the location of the site as listed in the application and as plotted on the transmitter site map, the staff cannot evaluate, *inter alia*, the site availability certification or the information supplied for FAA approval. Absence of this data also makes it impossible to determine the distance from the proposed site to other proposed or existing broadcast facilities and to the community of license. The geographic location also determines whether protection must be afforded to monitoring facilities and to radio quiet zones (*See* 47 C.F.R. § 73.1030), marks the center of the "blanketing" area (*See* 47 C.F.R. § 73.315), and is fundamental to an analysis of a proposal's environmental and electromagnetic effects.

[7] For example, it is well settled Commission policy that an applicant who has specified inconsistent data but clearly proposes to locate its antenna on an existing tower to which specific reference is made in its application, may survive a coordinate discrepancy. This is because the staff takes official notice of data specified in Commission records for licensed facilities and thus can reliably resolve the inaccuracy or inconsistency in the data given for the existing tower's location. *See, e.g., Steven B. Courts*, 4 FCC Rcd at 4766.

exhibits based on that site, no matter how many, would not eliminate the error. If erroneous coordinates were entered into the applicant's computer, then any exhibits using the computer output as a data source (including the FAA Form 7460) would perpetuate the initial error. The applicant may have originally considered several sites and inadvertently submitted exhibits corresponding to one of the alternative sites rather than the site ultimately selected. The consistency between exhibits contained in the application depends on how early in the preparation of the application the initial error occurred and how methodically it may have propagated throughout the remainder of the exhibits. Therefore, even if, *arguendo*, the other analyses proposed by the petitioner were to favor the plotted site over the V-B site, there is no guarantee that that site corresponded to the one actually intended, the one for which reasonable assurance was obtained, and the one for which the environmental statement was prepared. We therefore believe that the seven analyses set forth in the petition do not permit the staff to reliably determine the correct site coordinates, as our rules require.

10. JEM's second assertion, that the Commission could have used the set of coordinates provided to the FAA on Form 7460-1 to resolve its coordinate discrepancy, is also misplaced. The coordinates submitted on FAA Form 7460-1, information that the FAA uses to determine a proposed tower's potential to be a hazard to air navigation, are supplied by the applicant to the FAA from information submitted to the Commission on FCC Form 301 and, consequently, are subject to the same errors and inexactitude. Therefore, the coordinates provided on FAA Form 7460-1, in and of themselves, are inconclusive. By contrast, when an applicant identifies in its application a licensed tower on which it proposes to operate, the engineering data concerning the licensed facility, on file with the Commission, has already been processed by the staff and thus the staff is able to verify the proper coordinates. The Commission has previously rejected the argument that applicants such as JEM, whose proposals contain site coordinate discrepancies, are similarly situated with applicants whose proposals contain similar discrepancies, which may be resolved because the application references an existing, licensed tower as the intended transmitter site. *See Nicholasville Broadcasting Company*, 4 FCC Rcd 2574 (1989).

11. JEM cites several cases in which the Commission purportedly has gone beyond the confines of the application and referenced information contained within the Commission's own records to resolve other applicants' coordinate discrepancies. We reject JEM's contention that these cases establish that its application has been subject to disparate treatment, for they involve factual circumstances clearly distinguishable from those presented herein.

12. In *Carta Corporation*, 3 FCC Rcd 798 (M.M. Bur. 1988), an applicant listed conflicting sets of coordinates in a timely-filed amendment for a new transmitter site -- one set of coordinates was submitted on a tower sketch and another set was supplied in both Sections V-B and V-G -- the latter set being consistent with the coordinates plotted on the site map. However, unlike JEM's situation, the errant coordinates were merely noted on a tower sketch. The Commission does not require coordinates to be provided on a tower sketch; this was simply extraneous information provided by the applicant. Consistent sets of coordinates were provided where required to be provided. *See*, Appendix D of the *Report and Order* in Docket 84-740, at 4(a). *See also*, FCC Form 301, Section V-B, Item 2(b).

13. JEM cites another case in which discrepant coordinates did not affect the technical acceptability of the application. In *Peggie Post Mallery*, 5 FCC Rcd 4543 (M.M. Bur. 1990), the coordinates, gratuitously listed on a hand typed map label on the border of an engineering exhibit, did not agree with those listed where required in the application. Unlike the discrepancy within JEM's application, the geographic coordinates listed in Section V-B, Item 2 of the application and those plotted on the site map were in agreement, as required. Another case, *RC Communication, Inc.*, 5 FCC Rcd 3165 (M.M. Bur. 1990), involved a coordinate discrepancy that occurred in a late-filed amendment submitted for "good cause" pursuant to 47 C.F.R. § 73.3522(a)(2) because of an unforeseeable FAA problem with the applicant's initally proposed site. Since that amendment was not required to conform to the "hard look" processing requirements and did not cure tenderability or acceptability defects in the underlying application, the proper course of action would have been to require the applicant in the hearing designation order to further amend to correct the discrepancy. *See The Taber Broadcasting Company of New Mexico*, 4 FCC Rcd 7892 (1989); *See also, Pike Family Broadcasting, Inc.*, 6 FCC Rcd 5552 (1991). However, in *RC Communication*, the staff concluded that the correct coordinates in the amendment could be confidently determined by looking specifically to the coordinates listed on the applicant's FAA Form 7460-1, which was contained in a subsequent amendment. *Id.* at 3167. As we have previously noted, however, the data on a Form 7460-1 may have resulted from the propagation of the original error on an FCC Form 301, hence it, too, is suspect. Accordingly, to the extent that the staff's action in *RC Communication* suggests a different standard to be applied in resolving coordinate discrepancies, that holding is hereby expressly overruled. *See Amor Family Broadcast Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990); *See also, North Texas Media, Inc. v. FCC*, 778 F.2d 28 (D.C. Cir. 1985).[8]

14. In sum, the Commission does not resolve a conflict in coordinates by referencing information beyond the face of the application, with the sole exception of applicants proposing to mount on existing licensed towers. *See, e.g., La Crescent Community Broadcasters*, 3 FCC Rcd 2332, 2333 (M.M. Bur. 1988); *Carta Corporation*, 3 FCC Rcd at 799; and *Addison Broadcasting Company Inc.*, 2 FCC Rcd 6358 (M.M. Bur. 1987). The Commission declines to extend that policy.

15. Accordingly, for the aforementioned reasons, the petition for reconsideration filed by JEM Broadcasting, Inc., IS DENIED.

[8] We note that JEM's application was filed well prior to the staff decision in *RC Communication* so that JEM could not have relied to its detriment on that case in preparing its application.

FEDERAL COMMUNICATIONS COMMISSION

Donna Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-323

In re Applications of

HS COMMUNICATIONS, INC.	File No. BPH880505MZ
STACY C. BRODY	File No. BPH880505NO
PAMELA R. JONES	File No. BPH880505NR
CRAIG L. SIEBERT	File No. BPH880505PM
INTRACOASTAL AIRWAVES LIMITED PARTNERSHIP	File No. BPH880505PN

For Construction Permit for
New FM Station on Channel 271A,
Virginia Beach, Virginia

ORDER

Adopted: June 30, 1992; Released: July 8, 1992

By the Review Board: ESBENSEN and GREENE. Board Member BLUMENTHAL absent.

1. Applicant Intracoastal Airwaves Limited Partnership has failed to file exceptions to the *Initial Decision*, 7 FCC Rcd 1309 (ALJ, released February 13, 1992), in the above-captioned proceeding. This application will be dismissed for failure to prosecute pursuant to 47 C.F.R. § 1.276(f).

2. ACCORDINGLY, IT IS ORDERED That the application of Intracoastal Airwaves Limited Partnership (File No. BPH-880505PN) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 92-144

In The Matter of the
Application of

RICHARD A. BURTON
Harbor City, California

For Amateur Station
and Operator Licenses

HEARING DESIGNATION ORDER

Adopted: June 29, 1992; Released: July 9, 1992

1. Mr. Richard A. Burton has applied for Amateur Radio Service station and operator licenses. For the reasons stated below, his application will be designated for a hearing to determine whether the application shall be granted.

2. On September 11, 1981, the Commission revoked Burton's license for amateur station WB6JAC and affirmed the suspension of his General Class amateur operator license. These actions were based on Burton's willful and repeated violations of the Commission's Rules.

3. In *United States of America v. Richard A. Burton*, No. CR 82-378-R (C.D. Calif. June 28, 1982), Burton was convicted in the U.S. District Court for Central District of California (District Court) on four counts of transmitting without a license, in violation of Section 318 of the Communications Act of 1934, as amended (Communications Act), 47 U.S.C. § 318,[1] and on two counts of transmitting obscene, indecent or profane words, language or meaning, in violation of 18 U.S.C. § 1464.[2] The District Court sentenced Burton to eight years of imprisonment, of which six months were to be served in a jail-type institution and the remainder suspended. Burton was also placed on probation for five years and required to devote 1,500 hours to a charitable organization approved by his probation officer.

4. Upon appeal, the U.S. Court of Appeals for the Ninth Circuit (Court of Appeals) affirmed Burton's conviction of having violating 47 U.S.C. § 318, and reversed his conviction concerning 18 U.S.C. § 1464. *United States of America v. Richard A. Burton*, No. 82-1391 (9th Cir. October 25, 1983). On January 16, 1984, the District Court resentenced Burton. On or about October 1, 1984, the Court of Appeals ruled that the January 16, 1984, resentencing was invalid. On December 17, 1984, the District Court again resentenced Burton. Burton was sentenced to four concurrent one year terms of imprisonment, of which six months was to be served in a jail-type institution and the remainder suspended. Burton was also placed on probation for five years. On December 31, 1984, Burton violated the terms of his probation by operating radio apparatus without a license. As a result, his sentence was modified on May 1, 1985, to include therapy during the period of his probation.

5. On March 17, 1990, Burton again transmitted without a license. In *United States of America v. Richard A. Burton*, No. CR-90-357-RMT (C.D. Calif. October 1, 1990), Burton was again convicted of having violated 18 U.S.C. § 318. Burton was sentenced to one year of probation and a fine of $2,000.

6. In view of the amateur license revocation/suspension and the criminal convictions described above, it appears that Burton may lack the requisite qualifications to become an amateur licensee. Certainly, his convictions for unlicensed operation are relevant to evaluating the likelihood that he will comply with the Commission's Rules as a licensee in the amateur service. *See Character Qualifications*, 5 FCC Rcd 3252 (1990); *TeleSTAR, Inc.*, 3 FCC Rcd 2860, 2866 (1988); *Character Qualifications*, 102 FCC 2d 1179, 1183, *recon. denied*, 1 FCC Rcd 421, 424 (1986).

7. Section 309(e) of the Communications Act, 47 U.S.C. § 309(e), requires the Commission to designate an application for hearing if it is unable to find that granting the application would serve the public interest, convenience and necessity. Accordingly, the application of Richard A. Burton for amateur station and operator licenses is hereby DESIGNATED FOR HEARING pursuant to Section 309(e) of the Communications Act. If Burton desires to present evidence at a hearing, he must file a notice of appearance within 20 days from the release of this order. A time, place, and Presiding Judge will be designated, if necessary, by later order. If Burton does not file a timely notice appearance, his application will be subject to dismissal under Section 1.961(b) of the Commission's Rules, 47 C.F.R. § 1.961(b).

8. Based upon the above information, this case will be decided upon the following issues:

(a) To determine whether, in light of the license revocation/suspension and the convictions described above, Richard A. Burton is qualified to become a Commission licensee.

(b) To determine, in light of the foregoing issue, whether granting Richard A. Burton's application would serve the public interest, convenience and necessity.

---

[1] 47 U.S.C. § 318 provides, in pertinent part: "The actual operation of all transmitting apparatus in any radio station for which a station license is required by this Act shall be carried on only by a person holding an operator's license issued hereunder, and no person shall operate any such apparatus in such station except under and in accordance with an operator's license issued to him by the Commission...."

[2] 18 U.S.C. § 1464 provides: "Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined not more than $10,000 or imprisoned not more than two years, or both."

FEDERAL COMMUNICATIONS COMMISSION

Robert H. McNamara
Chief, Special Services Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

IT&E OVERSEAS, INC., File No. E-92-06
Complainant,

v.

SUNG IL LONG DISTANCE,
Defendant.

ORDER

Adopted: June 30, 1992; Released: July 8, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

1. On November 19, 1991, IT&E Overseas, Inc. (ITE) filed the above-captioned formal complaint against Sung Il Long Distance (Sung Il) alleging that Sung Il was providing international long distance telephone service from Guam without Section 214 authority, 47 U.S.C. § 214. It sought a cease and desist order and other appropriate sanctions until Sung Il acquired the appropriate authorization. On June 25, 1992, ITE filed a unilateral motion to withdraw the complaint on the ground that Sung Il had been acquired by another company which has the requisite authority and it does not want to pursue the matter further.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the motion to withdraw the complaint IS GRANTED and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Contract Tariff F.C.C. No. 14 — Contract Tariff Transmittal No. 34

ORDER

Adopted: July 1, 1992; Released: July 1, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 18, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective July 2, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 14 for Inter Office Channels operating at speeds of 1.544 Mbps and 44.736 Mbps and associated access functions and M-28 Multiplexing Office Functions.

2. On June 25, 1992, Sprint Communications Company Limited Partnership (Sprint) filed a petition to reject or suspend and investigate Contract Tariff Transmittal No. 34.

3. The Common Carrier Bureau has reviewed AT&T Communications Contract Tariff No. 14, Contract Tariff Transmittal No. 34 and Sprint's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 14, Contract Tariff Transmittal No. 34, filed by Sprint Communications Company Limited Partnership IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: July 2, 1992

Mr. Mike Barnhart
General Sales Manager
Station WOWW-FM
4220 N. Davis Highway
Post Office Box 2788
Pensacola, Florida 32503

Dear Mr. Barnhart:

This is in response to your request for ruling with respect to the applicability of the lowest unit charge requirements to a promotional advertising package offered by your station to commercial advertisers.

You explain this "100 percent rebate" advertising package as follows. Any advertiser on station WOWW that purchased at least $900 in advertising each month between November 1991 and February 1992, earned a minimum rebate of $3,600, with a maximum rebate of $4,000 allowed. (We thus note that there was, effectively, a $1000 per month ceiling on the amount of paid advertising that qualified for the rebate.) Advertisers could use their rebates by placing "best time available" advertising schedules on WOWW between March and December 1992. However, an advertiser could use no more than $400 of its earned rebate each month during the designated ten month period.

You ask whether the lowest unit charge ("LUC") rule applies to free schedules earned by an advertiser based on a commitment from previous months and, if so, whether there are any modifications that can be made to the promotion explained in your letter to make it "legal." You state that, if the LUC rule "prohibits" the broadcast of these $400 free schedules, you will be obligated to run schedules in excess of that amount outside the 45-day period so that each advertiser will receive the full amount of its earned rebate by the December 31, 1992, deadline. You argue that the application of the LUC rule to this promotion would be a hardship on both the station and its affected clients.

DISCUSSION

Section 315(b) of the Communications Act of 1934, as amended, states, in pertinent part, as follows:

> The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed... during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period.

47 U.S.C. Section 315(b). In the *Report and Order, Codification of the Commission's Political Programming Policies,* the Commission determined that package plans[1] may not be treated as a separate class of time for purposes of applying Section 315(b). 7 FCC Rcd at 694-5. Rather, stations are required to include in their LUC calculations all rates offered to commercial advertisers in packages. The *Report and Order* further requires that bonus spots, whether or not in packages, be given a value and factored into LUC calculations. *Id.* at 695.

In the recent *Memorandum Opinion and Order* clarifying the *Report and Order,* the Commission reiterated that it will defer to a station's reasonable, good faith judgment as to the allocation of the package price among spots in the package, paid and bonus. FCC 92-210, para. 54 (released June 11, 1992). However, the Commission clarified that the values allocated by the station to each paid and bonus spot in the package are the rates that are to be used in determining the LUC. For example, if a low rate is assigned to bonus spots, that rate becomes the LUC for all spots purchased in the same class of time and time period. *Id.* at para. 55. Moreover, the sum of the values assigned to the paid and bonus spots must equal the package price. *Id.* at para 56. While broadcasters are expected to allocate the package price among the spots in the package at the time the package is purchased, this can be done subsequently where packages were contracted for before release of the *Report and Order. Id.* at n.97 and n.101. The allocation of the package price can be set forth in the contract or invoice, or in a separate internal document. *Id.* at para. 56.

It is clear that, under Section 315(b), the WOWW promotion constitutes a "package plan," and the rebates provided to qualifying advertisers as part of that promotion are "bonus spots." Because these bonus spots will run during the 45- and 60-day LUC periods, the bonus spots must be assigned a value and factored into the LUC for the classes of time and time periods in which these spots are aired.[2] We will leave to WOWW's reasonable, good faith judgment the allocation of the package price among the paid and bonus spots.

[1] "Package plans" are defined in the *Report and Order* as "established combinations of spots offered at a given price, which are generally available to all advertisers." 7 FCC Rcd 678, 694 (1992) (*"Report and Order"*).

[2] The fact that these bonus spots were earned as a result of schedules purchased prior to the 45- or 60-day periods does not modify our conclusion that these bonus spots, or rebates, should be factored into the station's LUC. It matters only that these bonus spots ran during the 45- or 60-day period.

You ask whether there is any "legal" way to modify this promotion in order to avoid the effects of Section 315(b). In clarifying its ruling on the establishment of separate classes of time, the Commission in the *Memorandum Opinion and Order* articulated factors to be used in determining whether stations are avoiding the statutory intent of Section 315(b). One such factor is whether the same classes are used year round, or were developed solely for the campaign season. FCC 92-210 at para. 39. Similarly, if WOWW were to modify its promotion so that these bonus spots are aired outside the LUC periods, this would raise questions as to whether the station had unlawfully avoided the statutory intent of Section 315(b).

As to your argument that application of the LUC rules in this instance would be a hardship on the station and its clients, since the rebates you provide commercial advertisers are discount privileges, they must be factored into LUC calculations, particularly since the bonus spots will be broadcast during the LUC period. Staff action is taken here under delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter (see Commission Rule 1.4(b) [47 C.F.R. Section 1.4(b)]) by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Political Programming Branch
Enforcement Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Bell Atlantic Telephone Companies — Transmittal Nos. 495 and 514

Revisions to Tariff F.C.C. No. 1

ORDER

Adopted: July 1, 1992; **Released: July 1, 1992**

By the Chief, Tariff Division:

1. In Transmittal No. 495, the Bell Atlantic Telephone Companies (Bell Atlantic) propose to credit 100 percent of nonrecurring charges (NRCs) for Digital Data Service (DDS), DS1, and DS3 services if Bell Atlantic fails to meet a customer's confirmed installation due date, except under certain specified extenuating conditions. Bell Atlantic Description and Justification (D&J) at 1-3 to 1-5. Bell Atlantic states that it currently restores service within the four hour limitation about 75 percent of the time, and currently meets scheduled installation dates over 98 percent of the time.[1]

2. Sprint Communications Company LP (Sprint) filed a petition to suspend and investigate Transmittal 495, generally supporting the service but opposing aspects of its ratemaking treatment. Sprint claims that Bell Atlantic is accounting for the potential outage credits "on an 'above the line' basis, that is, to include the NRC and service interruption credits in the ratemaking process." Sprint Petition at 1-2. Sprint argues that this would negate any additional incentive for Bell Atlantic to prevent down-time and missed installation deadlines and would allow Bell Atlantic simply to flow the costs of the credits through to other general ratepayers. *Id.* at 2. Sprint further maintains that even if the resulting revenue impact is *de minimis*, as Bell Atlantic claims in its D&J (at 2-1), the credit plan is contrary to the spirit of the price cap rules and could combine cumulatively with other supposedly minor revenue effects to impact price cap variables significantly. Sprint also asserts that Bell Atlantic does not clearly explain its methodology for recalculating the price cap indexes. *Id.* at 3-4.

3. Bell Atlantic replies that, even apart from the ultimate incidence of the service credits, vigorous competition in the high capacity special access market creates very strong incentives for it to maintain timely repair and installation intervals. Bell Atlantic Reply at 2. In addition, Bell Atlantic claims that Sprint is mistaken in its assumption that these costs could be flowed through to other ratepayers because the costs do not qualify as exogenous under the price caps rules. *Id.* Moreover, Bell Atlantic notes, its tariff already provides certain lesser credits for service interruptions, and these have always been treated as above the line expenses. *Id.* at 2-3. Finally, Bell Atlantic states that Sprint raised nearly identical arguments against a similar service feature proposed by Pacific Bell, and the Bureau allowed it to take effect.[2]

4. The Tariff Division has reviewed Bell Atlantic Transmittal 495, the revisions made by Transmittal 514, and the associated pleadings. We conclude that the tariff revisions present no questions that warrant suspension or investigation at this time.

5. Accordingly, IT IS ORDERED that the petition to suspend and investigate Bell Atlantic Telephone Companies Tariff F.C.C. No. 1, Transmittal No. 495, filed by Sprint Communications Company LP, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Bell Atlantic had also proposed in Transmittal No. 495 to credit a customer's account for 50 percent of the recurring charges in a given month for DDS or DS1 service if there is a service interruption in that month of more than four consecutive hours. By Transmittal No. 514, filed June 30, 1992, Bell Atlantic withdrew this portion of Transmittal 495.

[2] *Id.* at 3, *citing* Pacific Bell Telephone Company, 6 FCC Rcd 5617 (Com.Car.Bur. 1991) (*Pacific Provisioning Commitment Plan)* (introducing a credit plan for nonrecurring charges).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Sprint Communications Company
Limited Partnership
Tariff F.C.C. No. 5 Transmittal No. 218

ORDER

Adopted: June 30, 1992; Released: June 30, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 24, 1992 American Telephone and Telegraph Company (AT&T) filed a petition to reject the captioned tariff revisions which are scheduled to become effective July 1, 1992 on 14 days' notice.

2. The Common Carrier Bureau has reviewed the captioned tariff revisions and AT&T's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

3. Accordingly, IT IS ORDERED that the petition to reject Sprint Communications Company Limited Partnership Tariff F.C.C. No. 5, Transmittal No. 218, filed by American Telephone and Telegraph Company IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-10

In re Applications of:

Wayne G. Mulligan, Richard D. Buckley, Jr., and Richard S. Korsen d/b/a RANCHO MIRAGE RADIO, A General Partnership	File No. BPH-870331MZ
HUGH R. PAUL	File No. BPH-870331PN
SUNDIAL RADIO BROADCASTERS, A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-870421MC
DANIEL P. MITCHELL	File No. BPH-870422MB
Isabelle Drake d/b/a DRAKE BROADCASTING	File No. BPH-870422ME
ANNE K. WALLACE AND WILLIAM F. WALLACE	File No. BPH-870422MJ

For Construction Permit for a New FM Station on Channel 258A in Rancho Mirage, California

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1992; Released: July 9, 1992

By the Commission:

1. In a decision released on January 17, 1992 the Review Board modified and affirmed the ALJ's initial decision preferring, on a comparative basis, Anne K. Wallace & William F. Wallace over Wayne G. Mulligan, Richard D. Buckley, Jr. and Richard S. Korsen d/b/a/ Rancho Mirage Radio, A General Partnership, Hugh R. Paul, Sundial Radio Broadcasters, A California Limited Partnership, Daniel P. Mitchell, and Isabelle Drake d/b/a/ Drake Broadcasting. *Rancho Mirage Radio*, 7 FCC Rcd 480 (Rev. Bd. 1992), affirming 6 FCC Rcd 2523 (ALJ 1991) (I.D.).[1]

2. In doing so, the Board affirmed the award of 100% integration credit to the Wallaces, Paul and Mitchell, 66.6% quantitative credit to Drake, no quantitative credit to Sundial, and the assessment of a very slight diversification demerit against Sundial. Only Mitchell has sought review of the Board's decision;[2] the denial of the applications of Paul, Sundial and Drake on comparative grounds is, therefore, final. We agree with the Board's resolution of this case. We wish, however, to comment on certain matters.[3]

3. Mitchell asserts that, contrary to the findings of the ALJ and the Review Board, William Wallace has evidenced an intent to retire from the partnership in the forseeable future. As support he cites, among other things, a snippet of testimony in which Wallace states that he has "no present intent" to retire. Mitchell argues that this testimony, coupled with the absence of affirmative statements that Wallace *does not* intend to retire, demonstrates the Wallace proposal is not sufficiently permanent to warrant integration credit.

4. A broader review of the Wallace testimony is instructive. It reveals the quoted language to be a part of the following exchange between Wallace and opposing counsel:

> Q: Well, is it your wish that you have [the] option if you win the station and you get it on the air that you want to go back to semi-retirement and play golf and tennis and things like that?
>
> A: Is that -- you're saying is that my wish?
>
> Q: Is that an option that you wish to reserve for yourself?
>
> A: I didn't intend that, no.
>
> Q: Well, is that your present intention?
>
> A: No, it is not my present intention.

Tr. 645.

5. Viewed in its proper context, Mr. Wallace's statement that he had "no present intention to retire" is shown merely to be a precise response to a narrowly drawn question from opposing counsel. Based upon the record before us, we agree with the Board that Wallace's proposal is sufficiently permanent to receive integration credit. The cited portion of the transcript does not require a different result.

6. Another question warrants comment. In challenging the permanency of the Wallace integration proposal, Mitchell repeatedly characterizes the "Retirement and Dissolution" provision of the Wallace Partnership Agreement as a "retirement option".[4] He then asserts that "in comparative broadcast cases the Commission has adopted a rebuttable presumption that options will be exercised." Application for Review at 8, citing *WWOR - TV, Inc.*, 6 FCC Rcd 6569, 6572 n.13 (1991).

7. The "options" to which *WWOR* and other cases cited by Mitchell refer are contractual agreements to buy or sell equity interests in a business enterprise. *Id.* They are wholly unlike the cited provisions of the Agreement. Consequently, the rebuttable presumption which the Commission employs in connection with equity-type options has no relevance here and does not require us to disturb the Board's finding that the Wallace proposal warrants full integration credit.

8. Finally, we recognize that, in affirming the Board's reliance on parol evidence in construing the Wallaces' partnership agreement, we have been somewhat more lenient than we would be if the issue were whether the ownership documents authorize a nominally passive owner to exercise authority over the applicant. Here, Wallace does not propose such a two-tiered ownership structure.

See Marlin Broadcasting, 5 FCC Rcd 5751, 5754 n.15 (1990), aff'd sub. nom. *Marlin v. FCC*, No. 90-1505 (D.C. Cir. Jan. 7, 1992), where we fully credited an integration proposal despite questions as to the division of authority between the sole owners.

9. ACCORDINGLY, IT IS ORDERED, That pursuant to 47 C.F.R. §1.115(g) of the Commission's rules, the Application For Review, filed February 18, 1992, by Daniel P. Mitchell, IS DENIED and that the grant of the application of Anne K. and William F. Wallace for a new FM station on Channel 258A at Rancho Mirage, California IS AFFIRMED.

10. IT IS FURTHER ORDERED, That the Motion for Leave to File Reply, filed March 11, 1992 by Mitchell, is DENIED.[5]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The winning applicant, Anne K. and William F. Wallace, is a general partnership; its principals are husband and wife. 7 FCC Rcd at 482 ¶ 10. Ms. Wallace, who owns 60 percent of the partnership, proposes to work as the station's full-time general manager. *Id.* Mr. Wallace, who owns the remaining 40 percent, will serve as its full-time sales manager and chief engineer. *Id.*

[2] Rancho Mirage Radio, A General Partnership, failed to file exceptions to the I.D.'s denial of its application; the Review Board accordingly dismissed its application for failure to prosecute. *See* 47 C.F.R. § 1.276(f); *Breaux Bridge Broadcasters, Limited Partnership*, 4 FCC Rcd 4995 (Rev. Bd. 1989).

[3] Now before the Commission are: (a) Application for Review, filed February 18, 1992, by Daniel P. Mitchell; (b) an Opposition filed March 4, 1992 by Anne K. Wallace and William F. Wallace; (c) Motion for Leave to File Reply, filed March 11, 1992 by Daniel P. Mitchell; and (d) Opposition to Motion for Leave to File Reply, filed March 16, 1992 by Anne K. Wallace and William F. Wallace.

[4] That provision, Paragraph 10 of the Agreement, reads as follows:

> Retirement and dissolution: The following provisions shall apply in the event of the retirement of a partner or termination of the partnership prior to any mutual termination.
>
> (a) Retirement. Any partner shall have the right to retire from the partnership at the end of any month. Written notice of his intention to retire shall be served upon the other partner at the office of the partnership at least 30 days before the end of the month.
>
> (b) Dissolution. Either partner shall have the right to dissolve the partnership on the last day of any month by serving notice in writing to that effect addressed to the other partner at the principal place of business of the partnership at least 20 days prior to the date of termination. Upon any such dissolution, a final accounting shall be had.
>
> Mitchell Exh. 8.

[5] Replies to oppositions to applications for review of final decisions of the Review Board may be filed only if the Commission requests a reply. *See* §1.115(d) of the Commission's rules, 47 C.F.R. §1.115(d). No such reply was requested here, and Mitchell's Motion for Leave to File Reply is accordingly denied.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-21

In re Applications of

FRESNO FM LIMITED PARTNERSHIP	File No. BPH-861230MB
JOHN EDWARD OSTLUND	File No. BPH-861230MD
VALLEY RADIO, LTD., A CALIFORNIA LIMITED PARTNERSHIP	File No. BPH-861231ME
LAURA H. NORMAN	File No. BPH-861231MI

For Construction Permit for
a New FM Station on Channel
257A, Fresno, California

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1992; Released: July 9, 1992

By the Commission:

1. Before the Commission for consideration is a Commission Memorandum Opinion and Order that reversed a Review Board Decision, granted John Edward Ostlund's application for a new FM station in Fresno, California based upon its superior integration proposal, and denied the competing applications of Laura H. Norman and Valley Radio, Ltd., and Fresno FM Limited Partnership.[1] *Fresno FM Limited Partnership*, 6 FCC Rcd 6998 (1991). Based upon its determination that Ostlund, by virtue of his longer local residence and more extensive civic activities, was superior to Norman on the combined local residence and civic participation factor, the Commission found that Ostlund's integration proposal was qualitatively superior to Norman's. However, Valley seeks reconsideration, urging that neither Ostlund nor Norman is entitled to any quantitative credit for its integration proposal. Fresno FM has not filed a timely Petition for Reconsideration with the Commission or a Notice of Appeal with the Court of Appeals, and the Commission's denial of its application is therefore final.

2. In support of its claim that it is the only applicant entitled to any integration credit and that it therefore prevails over Norman and Ostlund, Valley raises essentially the same arguments contained in its application for review. It is well established that the Commission does not grant reconsideration for the purpose of reviewing matters on which the Commission has already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1965), aff'd sub nom. *Lorain Journal Co. v. FCC*, 351 F.2d 824 (D.C. Cir. 1965). *See* also 47 C.F.R. § 1.106(b)(2) of the Commission's rules providing that, where the Commission has denied an application for review, it will entertain a petition for reconsideration only if the petition relies on facts relating to new or changed circumstances or on facts unknown to the petitioners since the last opportunity to present such matters. As Valley's petition for reconsideration does not rely on newly discovered matters, it is dismissed. One matter warrants brief comment, however.

3. John Edward Ostlund proposes to be integrated full time. Ostlund owns an advertising agency that he currently manages on a full time basis. Noting that Ostlund proposes to retain his interest in the advertising agency, the Board concluded that Ostlund had not met his burden of showing how these conflicting time commitments would be reconciled. It therefore rejected Ostlund's integration proposal as unreliable. The Commission disagreed, finding that Ostlund's pledge to entrust his full time duties to three long-time agency employees met his burden of establishing the reliability of Ostlund's integration proposal. In reinstating the ALJ's award of 100% quantitative credit for that proposal, the Commission relied on testimony that all three employees have experience and "basically, run the company." The Commission also noted that Ostlund had set forth a specific plan describing his current duties in detail and identifying which of the three employees would be responsible for each task.

4. Valley argues, however, that Ostlund's integration proposal is not entitled to any comparative credit under *Anchor Broadcasting Limited Partnership*, 5 FCC Rcd 2432 (Rev. Bd. 1990), modified on other grounds, 6 FCC Rcd 721 (1991), remanded on other grounds, *Susan M. Bechtel v. FCC*, No. 91-1112 (D.C. Cir., January 31, 1992), which rejected the full time integration proposal of a principal with an ownership interest in a business that she currently managed on a full time basis. In pledging to be integrated full time, she had not promised to sell her existing business interest, to hire or train personnel to assume her present business responsibilities, or otherwise shown how her present duties would be handled in her absence.

5. In contrast, Ostlund has set forth a specific and credible plan outlining his present agency responsibilities and explaining how those duties can be handled by three long-time *experienced* agency employees in the future. Valley does not dispute the representation that this will reduce Ostlund's time commitment to the agency to only five hours each week, thereby freeing him to honor his pledge to be integrated at the station at least 40 hours each week. Thus, despite his proposed retention of the advertising agency and his decision not to hire or train any personnel, Ostlund has met his burden of showing a specific and credible plan for reconciling Ostlund's full-time integration pledge with his agency responsibilities. Accordingly, Ostlund's integration proposal merits 100% quantitative credit, thereby entitling him to a dispositive integration preference in this proceeding. *See Coastal Broadcasting Partners*, 7 FCC Rcd 1432, 1433 ¶¶ 8-10 (1992); *Ronald Sorenson*, 6 FCC Rcd 1952 ¶ 4 (1991).

6. ACCORDINGLY, IT IS ORDERED, That, pursuant to 47 C.F.R. § 1.106 of the Commission's Rules, the Petition for Reconsideration, filed December 27, 1991, by Valley Radio Ltd. IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTE

[1] The following pleadings are pending before the Commission: (a) Petition for Reconsideration, filed on December 27, 1991, by Valley Radio, Ltd.; (b) Comments on Petition for Reconsideration, filed on January 7, 1992, by Laura H. Norman; and (c) Opposition to Petition for Reconsideration, filed on January 10, 1992, by John Edward Ostlund.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-192

In re Applications of

THOMAS W. LAWHORNE File No. BPH-880505OA

CAM-BROADCASTING, INC. File No. BPH-880505OJ

For Construction Permit for New
FM Station, Channel 271A,
Sylvester, Georgia

ORDER

Adopted: July 1, 1992; Released: July 9, 1992

By the Commission:

1. Administrative Law Judge Edward J. Kuhlmann granted the application of Thomas W. Lawhorne based on CAM-Broadcasting's (CAM) disqualification for failure to meet its burden under a site availability issue. 6 FCC Rcd 4183 (Admin. L.J. 1991). The Review Board affirmed the ALJ. 7 FCC Rcd 13 (Rev. Bd. 1992).

2. Now before us are CAM's application for review filed February 3, 1992 and related pleadings.[1] After thoroughly reviewing the pleadings and the record before us, we affirm the Review Board.

3. Nonetheless, the following statement in the Board's opinion warrants clarification: "The Board finds that Lawhorne was not required to report the arrest under *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986)." (citations omitted). In context, the Board is correct that in comparative cases in which the record has been closed, the reporting of a felony arrest (as opposed to a conviction) would not, standing alone, warrant further proceedings.

4. However, in the answer to Section II, Question 10(a) of Lawhorne's application form, Lawhorne was required to provide full disclosure concerning any final action (conviction) concerning, in pertinent part, a criminal felony proceeding. Moreover, Question 10(b) of the same form requires full disclosure concerning any pending proceeding relating to any of the matters referred to in Question 10(a). Pursuant to 47 C.F.R. § 1.65(b), an applicant is required to report all significant changes in information provided in its application. Thus, the issuance of the arrest warrants against Lawhorn is a matter that should have been reported to the Commission. Nonetheless, under the circumstances of this case, CAM failed to show evidence of a pattern of repeated violations or other significant carelessness or inattention, deliberate concealment, or probable decisional significance sufficient to warrant reopening the record to add a reporting issue. *See Merrimack Valley Broadcasting, Inc.*, 99 FCC 2d 680, 683 n.9 (1984).[2]

5. Because our decision herein affirms the Board's denial of CAM's application, CAM's petition for leave to amend filed January 15, 1992, seeking to demonstrate FAA tower site approval is moot and will be dismissed.

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Leave to Amend filed on January 15, 1992 by CAM-Broadcasting, Inc. IS DISMISSED as moot.

7. IT IS FURTHER ORDERED, That the Conditional Motion to Reopen the Record and Enlarge Issues filed February 5, 1992 by Thomas W. Lawhorne IS DISMISSED as moot.

8. IT IS FURTHER ORDERED, That the Application for Review filed February 3, 1992 by CAM-Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Additional pleadings filed in this proceeding are the following: (1) a Petition for Leave to Amend filed January 15, 1992 by CAM; (2) Opposition to Petition for Leave to Amend filed January 16, 1992 by Lawhorne; (3) Comments in Opposition to Petition for Leave to Amend filed January 17, 1992 filed by the Mass Media Bureau; (4) an executed amendment page filed January 22, 1992 by CAM; (5) a Conditional Motion to Reopen the Record and Enlarge Issues filed February 5, 1992 by Lawhorne; (6) an Opposition to Conditional Motion to Reopen filed February 14, 1992 by CAM; (7) an Opposition to Application for Review filed February 18, 1992 filed by Lawhorne and (8) a Reply to Opposition to Conditional Motion to Reopen filed February 24, 1992 by Lawhorne.

[2] We specifically endorse the Board's observation that "should this matter be ultimately resolved adversely with respect to Lawhorne, appropriate subsequent steps may be taken at that time." 7 FCC Rcd at 16 ¶ 19.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-290

In re Applications of:

KEVIN POTTER File No. BPH-880706MC

MARK RODRIGUEZ, JR. File No. BPH-880707MJ

For Construction Permit for
New FM Station, Channel 300C2,
Gainesville, Texas

MEMORANDUM OPINION AND ORDER

Adopted: June 25, 1992; Released: July 9, 1992

By the Commission:

1. We have considered an application filed by Mark Rodriguez on January 13, 1992 for review of the Review Board's decision in this case, 6 FCC Rcd 7278 (Rev.Bd. 1991), which holds that it would serve the public interest to grant the application of Kevin Potter and deny Rodriguez' competing application.[1] We will deny the application for review.

2. The presiding ALJ concluded that both applicants are basically qualified, but that Potter deserves a slight preference over Rodriguez for diversification and a more clearcut preference for integration, as Potter proposes to devote 40 hours per week to station management, whereas Rodriguez merely proposes to spend 20 hours per week at the station. 6 FCC Rcd 5252 (ALJ 1991). The Review Board affirmed these holdings in the decision under review.

3. In his application for review Rodriguez alleges that Potter improperly gained a tactical advantage by initially pledging to divest himself of his interest in two broadcast stations in Illinois and then withdrawing the divestiture commitment after the parties had exchanged direct cases, when he could see that he need not divest that interest for comparative superiority over Rodriguez, who was proposing only part-time integration and was subject to a divestiture demerit. Rodriguez urges us to thwart this "gamesmanship" by denying Potter all integration credit.

4. The lower decisions reject this argument as resting on unfounded speculation. 6 FCC Rcd at 7279 ¶ 8; 6 FCC Rcd at 5256 ¶ 38. We agree that the charge of gamesmanship lacks merit. Potter did not violate any rule or policy by forthrightly reporting that he no longer intended to divest his existing stations, and the mere fact that he did so does not support an inference that he misrepresented his intention when pledging to divest them in the first instance. *Cf. Ruarch Associates*, 103 FCC 2d 1178, 1180 (1986).[2]

5. Rodriguez next urges us to adopt and apply here a new policy that proposals for full-time integration by principals with significant outside business interests are inherently incredible, thereby ruling out an award of full-time integration credit to Potter, who, as noted, owns two Illinois broadcast stations that he does not propose to divest. In support of this request, Rodriguez asserts that it is impossible to predict whether an applicant will substantially ignore an ongoing enterprise in which he has been immersed in order to devote full time to a fledgling broadcast station. Further, he maintains that such an approach is implicit in the *Policy Statement on Comparative Broadcasting Hearings*, 1 FCC 2d 393 (1965) and in *Blancett Broadcasting Co.*, 17 FCC 2d 227 (Rev. Bd. 1969).

6. In the alternative, Rodriguez maintains that Potter has failed to show by a preponderance of the evidence that he will curtail his involvement in the management of his Illinois stations to such an extent that it will be feasible for him to devote 40 hours per week to managing the prospective station in Gainesville, Texas. Potter's plan to delegate daily management of the Illinois stations to employees and visit them only once or twice a year is not credible, according to Rodriguez, because Potter has not identified the employees that he would allegedly promote to take his place or shown that they are well-qualified to become station managers. Hence, Rodriguez contends that the award of integration credit to Potter is inconsistent with prior opinions holding that "a blanket pledge to hire more employees and diminish hours spent" on a "significant" proprietary business is not enough to allay doubt as to the reliability of an integration commitment by an owner/manager of the business, citing, *inter alia*, *Naguabo Broadcasting Co.*, 6 FCC Rcd 912, 924 n.63 (Rev. Bd. 1991), rev. denied 6 FCC Rcd 4879 (1991), *Ronald Sorenson*, 6 FCC Rcd 6901 (1991), and *Fresno FM Ltd. Partnership*, 6 FCC Rcd 6998 (1991). Finally, Rodriguez argues that Potter's alleged intention to curtail management of his Illinois stations in order to devote full time to the prospective Gainesville station is suspect because he has admittedly been preoccupied with managing the Illinois stations since 1982 and has been financially sustained by earnings from that source, whereas the prospective Gainesville station presumably would not earn a profit for some time after start-up.

7. We find that the new approach that Rodriguez urges upon us is not implied by the *Comparative Policy Statement* or *Blancett*. Our current policy, as delineated in *Blancett* and in more recent opinions, holds that in order to sustain a claim of credit for the full-time integration of someone planning to retain outside businesses, an applicant must set forth a specific and credible plan explaining how the principal in question would arrange for the businesses to be managed while fulfilling his integration commitment. 17 FCC 2d at 230 ¶ 7. *See* also *Naguabo Broadcasting Company*, 6 FCC Rcd 4879, 4880 ¶ 8 (1991). We see no reason to change that policy in this instance. We agree with the Board that Potter deserves full credit for the proposal because, as explained below, we find that he furnished a sufficiently specific and credible explanation of how he would reconcile that proposal with his ongoing business interests in light of the record as a whole. 6 FCC Rcd at 7279 ¶ 7 and 7281 n.2.

8. The record affords reasonable assurance that Potter will fulfill his integration commitment, notwithstanding the fact that he has not named or provided information about the qualifications of the employee that he would

appoint to manage the Illinois stations in his absence. The key consideration is Potter's sworn and undisputed statement of intention to move from the vicinity of the Illinois stations and take up permanent residence in Gainesville, 550 miles away. The infeasibility of Potter's devoting a significant number of hours per week to actively supervising the operation of radio stations that are situated 550 miles away from his place of residence distinguishes the integration proposal in this case from those found wanting in *Sorenson* and other similar decisions. In the past, we have required disclosure of the identities and qualifications of prospective substitute managers to establish the credibility of commitments to curtail involvement in outside businesses situated relatively near the proposed stations, because of the ease with which generalized commitments could, under such circumstances, otherwise be breached. In our view, the same degree of specificity is not warranted in cases like this in which the distance between the new and existing businesses is so great that continuing significant day to day involvement in both would be unrealistic, where it is undisputed that the applicant would reside in the vicinity of the new station, and where nothing in the record calls the *bona fides* of his representations otherwise into question.

9. The facts of this case are also readily distinguishable from those considered in *Julia S. Zozaya*, 5 FCC Rcd 6607 (1991), *Leininger - Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987), rev. den. 3 FCC Rcd 1181 (1988), and *Pleasure Island Broadcasting, Inc.*, 6 FCC Rcd 4163 (Rev. Bd.), in which full-time integration plans were found unreliable, in contrast to the present case, because of the applicants' stated plans to continue their substantial involvement in businesses conducted at considerable distances from the sites of the proposed stations. Finally, we disagree with Rodriguez' contention that, because Potter is currently devoting full time to management of the Illinois stations and the proposed Gainesville station would not likely be immediately profitable, his plan to devote his attention primarily to the latter is so clearly contrary to his financial self-interest as to be unreliable. For the reasons given in the decisions below, we affirm the findings of the ALJ and the Board that Potter's proposal is credible.

10. In any event, even if we were to deny any integration credit to Potter, he would still prevail by virtue of his diversification preference. We are not persuaded by Rodriguez' contention that the preference that he would receive for integration if Potter were entitled to zero integration credit would outweigh the latter's diversification preference. The integration preference that would be due to Rodriguez in that event would only be slight, inasmuch as Rodriguez merely proposes to be involved in station management for 20 hours per week, and that slight preference would count for less than Potter's slight diversification preference. *See Radio Laredo*, 49 RR 2d 1489 (Rev. Bd. 1981); *Omaha TV 15*, 4 FCC Rcd 730, 734 (1988); and *Gilbert Broadcasting Corp.*, 91 FCC 2d 451, 469-70 (1982).

11. ACCORDINGLY, IT IS ORDERED that the application for review that Mark Rodriguez, Jr. filed on January 13, 1992 IS DENIED and the decision of the Review Board, 6 FCC Rcd 7278 (Rev. Bd. 1991), granting Kevin Potter's application, BPH-880706MC, IS AFFIRMED.

12. IT IS FURTHER ORDERED that the motion to supplement that Kevin Potter filed on April 24, 1992 IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Kevin Potter filed an opposition to the application for review on January 28, 1992, and on April 24 Potter filed a motion to supplement the opposition. Rodriguez filed an opposition to the motion to supplement on April 28.

[2] There is no conflict between our ruling on this point and our recent modification of the so-called *Ruarch* policy for future cases, *Proposals to Reform the Commission's Comparative Hearing Process to Expedite the Resolution of Cases*, 6 FCC Rcd 157, 160 ¶ 21 (1990), 6 FCC Rcd 3403 ¶ 6 (1991). Cf. 47 C.F.R. §73.1620(g) (3), which expressly exempts applicants from reporting deviations from integration or diversification proposals when the orders granting their applications relieved them of the obligation to adhere to the proposals.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 87-246

In re Applications of

WARREN PRICE COMMUNICATIONS, INC.
Bay Shore, New York

File No. BPH-850712GV

et al.

For a Construction Permit
for a new FM Station on
Channel 276 at Bay Shore,
New York

MEMORANDUM OPINION AND ORDER

Adopted: July 1, 1992; **Released: July 9, 1992**

By the Commission:

1. The Commission dismissed Long Island Music Broadcasting Corp.'s (LIMBC) application. *Warren Price Communications, Inc.*, 4 FCC 2d 1992 (1989). LIMBC's appeal of the Commission's order was dismissed by the Court of Appeals with prejudice. *Long Island Music Broadcasting Corporation v. FCC*, Case No. 91-1302 (D.C. Cir. Mar. 26, 1991). This proceeding was subsequently settled by an agreement among the remaining applicants which provided for a merger of three of those applicants into a new entity, Shore Media, Inc. (Shore Media). *Warren Price Communications, Inc.*, 90M-3570 (ALJ Nov. 8, 1990), *affirmed* 6 FCC Rcd 575 (Rev. Bd. 1991). In a Memorandum Opinion and Order, *Warren Price Communications, Inc.*, 6 FCC Rcd 4424 (1991), the Commission, *inter alia*, refused to set aside the settlement in this proceeding and denied a request to reopen the record and specify a site availability issue against Shore Media. Now before the Commission are a Petition for Reconsideration filed August 19, 1991 by LIMBC; an Opposition filed August 28, 1991 by Shore Media; and a Response filed September 9, 1991 by LIMBC.

2. On November 26, 1991, the Mass Media Bureau (8920-DEB) granted an application to modify Shore Media's construction permit to provide for a side mounted antenna on the antenna tower of broadcast station WLIX (File No. BMPH-910730ID). The Office of General Counsel asked LIMBC and Shore Media to comment on whether zoning clearance would be required for Shore Media to implement its modified engineering proposal. FCC 92I-02 (OGC Jan 9, 1992). Comments were filed by Shore Media on January 15, 1992, and by LIMBC on January 21, 1992, and reply comments were filed by LIMBC on January 27, 1992.[1] In addition on February 20, 1992 LIMBC filed a Petition to Revoke Shore Media's construction permit, and Shore Media filed an Opposition on March 4, 1992.

3. LIMBC argues that Shore Media does not have reasonable assurance of access to its proposed antenna site and that as result the settlement agreement is invalid, the settlement should be vacated, and the record reopened for consideration of site availability, candor and ex parte issues. Shore Media responds that LIMBC lacks standing to petition for reconsideration and that its petition is dilatory and fails to rely on new facts or changed circumstances as required by 47 C.F.R. § 1.106(b)(2). Shore Media also asserts that LIMBC has not raised a substantial and material question of fact warranting reopening the record, specification of issues or further hearing.

4. *Standing and Timeliness*: LIMBC has standing to contest Shore Media's qualifications. *Orange Park Florida T.V., Inc. v. FCC*, 811 F. 2d 664, 670-73 (D.C. Cir. 1987) (holding that a dismissed applicant has an "injury that is separate and distinct from . . . [its] failure to secure a permit, namely the opportunity to try again" if the remaining applications are denied).[2] Moreover, although LIMBC has failed to rely on new or changed circumstances as required by Section 1.106(b)(2),[3] reconsideration may be granted where "consideration of the facts relied on is required in the public interest." 47 C.F.R. § 1.106(c)(2). LIMBC argues that Shore Media does not have reasonable assurance of access to its proposed transmitter site. The public interest would not be served by the grant of a construction permit to an applicant that does not have access to a transmitter site and will be unable to construct its facilities. Thus, we will address the merits of LIMBC's petitions.

5. *Site Availability*: Attached to LIMBC's Petition is a letter dated August 8, 1991, from the Supervisor for the Town of Islip, where Shore Media proposes to locate its antenna. The Supervisor advised the Commission that the Town is opposed "to any new tower structures based on critical environmental concerns" and that a proposal to "significantly alter or increase the height of an existing structure in a highly populated area would squarely fall within the restrictions established" by the Town when it rejected a National Weather Service proposal to build a new tower.

6. Shore Media proposes to mount its antenna on a tower owned by Station WLIX. Shore Media submitted documentation indicating that it will not increase the height of the tower and a letter from the Principal Zoning Inspector for the Town, stating that Shore Media's antenna "can be attached to the tower . . . without a permit or Town Board approval." However, in a reply pleading, LIMBC submitted a letter from the Town Commissioner, stating that the Zoning Inspector was incorrect, and that "Town Board approval after a Public Hearing is required and must be obtained before any FM antennae are installed." The Commissioner acknowledged that the Town Board allowed construction of a satellite dish antennae on the tower in 1984, but stated that this decision did not consider "FM antenna . . . microwaves which may have an adverse environmental effect." LIMBC also submitted a further letter from the Town Supervisor stating that any proposal for a side mounted FM antenna would come within the restrictions established by Town when it denied the Weather Service's request to build a new tower. Shore Media, however, then submitted an opinion from its zoning counsel that zoning from the Town is not required for Shore Media's antenna, and it asserts that it submitted

documentation to the Town of Islip confirming that its antenna will not transmit harmful microwave emissions and that zoning is not required.

7. Zoning matters are of local concern and zoning questions must be resolved by local authorities and not by the Commission. The Commission assumes that applicants will secure zoning approval and it will not designate issues involving zoning questions absent a reasonable showing that an applicant will not be able to obtain prior authorization for its proposed construction. *Gainesville Media, Inc.*, 59 FCC 2d 382, 385 (Rev. Bd. 1976). Designation of a zoning issue requires a showing that:

> a majority of the members of the applicable governing board are not in favor of granting an authorization or variance for construction of the broadcast tower [antenna] within their jurisdiction . . . .

Kenter Broadcasting Co., 62 RR 2d 1573, 1578 (1986), citing *Edward G. Atsinger*, 29 FCC 2d 443, 451 (Rev. Bd. 1971). *Atsinger* holds that the opinion of one member of a Planning Commission that zoning would be denied is insufficient to warrant reopening the record without a showing that his opinion is held by a majority of the Planning Commission.[4]

8. In view of these standards, we conclude that LIMBC has not raised a substantial and material question of fact concerning whether Shore Media will be able to access its proposed antenna site. *Gencom, Inc. v. FCC*, 823 F.2d 171, 180-82 (D.C. Cir. 1987); *Citizens for Jazz on WRVR, Inc. v. FCC*, 775 F.2d 392, 395 (D.C. Cir. 1985). Although the Town Supervisor cited a decision denying permission to the Weather Service to construct a new tower, that decision did not involve side mounting an antenna on an existing tower. The Supervisor now states that the Weather Service ruling was broad enough to include a side mounted antenna. It still appears, however, that there is sufficient ambiguity about the scope of the earlier ruling that the Town's Principal Zoning Inspector believed that the ruling would not apply to Shore Media's proposed antenna. In addition, the Town Supervisor did not specifically state that a request for zoning would be denied,[5] and LIMBC has not shown that a majority of those in authority to rule on zoning questions would either require zoning approval for Shore Media's antenna proposal or vote to deny a request for zoning for that proposal. *Kenter Broadcasting Co., supra*, 62 RR 2d at 1578. Thus, LIMBC has not raised a substantial and material question of fact sufficient to warrant reopening the record for further hearings on whether Shore Media will be able to obtain authorization to mount its antenna on the WLIX tower, or on whether it is qualified to be a licensee. *Colonial Communications, Inc.*, 6 FCC Rcd 2296, 2296-97 ¶ 6 (1991) (request to reopen record denied for lack of substantial and material issue remaining in actual dispute).

9. *The Settlement Agreement*: LIMBC has failed to present new facts or changed circumstances concerning this matter as required by Section 1.106(b)(2). We fully considered the contentions concerning the settlement agreement when we denied LIMBC's request that we review the Review Board's refusal to set aside the settlement agreement, and reconsideration will not be granted for the purpose of again debating matters upon which we have already deliberated and spoken. *WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965), *cert. denied* 383 U.S. 967 (1966). Thus, LIMBC's request for reconsideration of its request to vacate the settlement agreement will be denied.[6]

10. *Other Arguments*: LIMBC argues that in light of the earlier letter from the Town Supervisor it was improper for Shore Media to submit a statement from the Principal Zoning Inspector. This argument is without merit. The Town Supervisor's prior statements (November 8, 1990 and August 8, 1991) indicated that the town was opposed to any proposal that would "significantly alter or increase the height of an existing structure." It did not specifically address the impact of a side mounted antenna on an existing tower. There is sufficient ambiguity about the zoning requirements that the Zoning Inspector apparently believes that a side mounted antenna, that would not increase the height of the tower, could be mounted without further approval. Moreover, there was not a clear statement on the record in this proceeding, concerning whether the Town Supervisor considered a side mounted antenna, on an existing tower, as a substantial modification for zoning purposes until after Shore Media filed the Zoning Inspector's statement and the statements from the Town Supervisor do not establish that his view is that of a majority of those with authority to rule on zoning matters as required by *Kenter*.[7] Thus, it was not unreasonable for Shore Media to rely on the letter from the Zoning Inspector.[8]

11. LIMBC's allegations of improper ex parte communications with respect to the modification of Shore Media's permit, and of a conspiracy with the principals of station WLIX, are based on speculation and do not warrant further consideration. In this regard, LIMBC has presented no evidence that Shore Media proceeded improperly in modifying its proposal or that WLIX has been a party to any improper conduct.

12. LIMBC also argues that the antenna site poses short spacing and air traffic hazard problems. By *Memorandum Opinion and Order*, FCC 90M-3130, released October 3, 1990, the ALJ resolved the short spacing questions by summary decision. The facts alleged by LIMBC were considered by the ALJ and LIMBC has failed to show that the ALJ's ruling was in error. Finally, the FAA conducted an aeronautical study of Shore Media's proposed antenna (No. 91-AEA-0914-OE) and issued a no hazard determination on July 18, 1991. LIMBC has not presented any basis for questioning the validity of the FAA's ruling.

13. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration filed August 19, 1991 by Long Island Music Broadcasting Corporation, and the Petition to Revoke filed February 20, 1992 by Long Island Music Broadcasting Corporation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] LIMBC argues that the General Counsel's Order erroneously requested comments on the need for "further zoning clearance," asserting that Shore Media needs "initial zoning clearance." It claims that this langauge indicates that Shore Media "has been successful in its attempt to deceive and mislead" the Commission about the access to its proposed site. Reply comments at 5. LIMBC has misread the Order and its arguments are speculative and without merit. The site had already been given zoning clearance for the WLIX tower. The Order merely inquired into whether Shore Media's antenna could be attached without further zoning for that tower.

[2] In this regard we note that the Court dismissed LIMBC's appeal of a ruling denying its request to dismiss the applications filed by mutually exclusive applicants without prejudice to its right to refile after a final decision. *Long Island Music Broadcasting Corporation v. FCC*, Case No. 90-1518 (D.C. Cir. Mar. 26, 1991).

[3] LIMBC could have presented documents making its threshold showing for reopening the record earlier in the proceeding.

[4] The Board noted that this was "[m]anifestly so" when an attorney formerly with the Planning Commission submitted a statement that the single member's opinion did not represent the full Commission's judgment. 29 FCC 2d at 450-51.

[5] The Town Commissioner's letter is based on an erroneous assumption that an FM antenna transmits microwaves. As defined by the Commission's Rules, microwave frequencies are frequencies of 890 MHz and above, whereas FM frequencies are between 88 MHz and 108 MHz, with this particular Bay Shore channel being 103.1 MHz. Thus, the Town Commissioner's letter contains no showing of a problem that would preclude effectuation of Shore Media's proposal and it is of no probative value with respect to the instant question.

[6] To the extent that LIMBC argues that it was prejudiced by the settlement agreement, we do not agree. The agreement simply reflects the undertaking of the remaining applicants and it is intended to facilitate an early institution of a new broadcast service. The agreement does not concern Shore Media's qualifications, and has no bearing on LIMBC's right, if any, to continued participation in this proceeding. LIMBC's argument that it has an interest in a prior settlement with one of the parties to the settlement agreement is not relevant in view of the prior dismissal of LIMBC's application for lack of prosecution. The earlier agreement was a private contractual arrangement. The Commission is not the proper forum to resolve questions concerning private contractual arrangements between dismissed applicants.

[7] LIMBC also faults Shore Media for not filing the January 14, 1992 letter from the Town Commissioner, overruling the Principal Zoning Inspector's determination. In light of the fact that the letter had no probative value, see n.5, *supra*, Shore Media's failure to file it as urged by LIMBC is of no consequence.

[8] LIMBC argues that Shore Media was dilatory in submitting the Zoning Inspector's statement which was dated September 24, 1991 but not filed until January 15, 1992. However, the time for responding to LIMBC's Petition for Reconsideration had passed by the time Shore Media received the Zoning Inspector's statement, and Shore Media promptly filed the statement at the first opportunity thereafter when the General Counsel's order requested additional pleadings with respect to this matter. Thus, LIMBC has not shown that the delay raises potentially disqualifying issues. *See Hampshire County Broadcasting* Co., 3 FCC Rcd 6137, 6138 ¶ 10 (1988) (absent a showing of an intent to conceal, the failure to timely file information pursuant to 47 C.F.R. § 1.65 is not decisionally significant).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Miami MDS Company and — File No. 50121-CM-MP-88

Boston MDS Company — File No. 50149-CM-MP-88

For extension of time to construct a Channel 2 Multipoint Distribution Service station (WLK230) at Miami, Florida and station (WGW339) at Boston, Massachusetts

and

Notices of Apparent Liability Issued relative to Multipoint Distribution Stations WLK230 at Miami, Florida and WGW339 at Boston, Massachusetts

MEMORANDUM OPINION AND ORDER

Adopted: June 29, 1992; Released: July 9, 1992

By the Commission:

INTRODUCTION

1. The Commission has before it: (a) the actions of the Domestic Facilities Division (DFD), Common Carrier Bureau denying extensions of time to construct the above-captioned single-channel Multipoint Distribution Service (MDS) stations; (b) the subsequent denials on reconsideration of the Division's actions; and (c) responses to the Notices of Apparent Liability issued relative to these facilities. For reasons discussed below, we affirm the staff's actions.

BACKGROUND

2. *Miami MDS Company.* Miami MDS Company (Miami), a joint venture of Tel Car Corporation, Private Networks, Inc., MCCA Service Corporation, and Multi-Communications Service, Inc., was granted an MDS construction authorization, with an initial construction expiration date of February 3, 1987. Miami filed an application to modify its construction authorization in order to change transmitter location and to replace its transmitting antenna so that it would be identical to the antenna used by the MDS channel 1 licensee in Miami. The Division granted a modification of Miami's construction authorization, with an expiration date of March 1, 1988. On March 1, 1988, Miami filed an Application for Extension of Construction Authority, FCC Form 701, requesting additional time to complete construction. In its extension application, Miami stated that equipment had not been ordered, nor had construction commenced. Miami explained the construction delay was due to its decision to co-locate its proposed station with two proposed Multichannel MDS (MMDS) stations, and an existing Instructional Television Fixed Service (ITFS) station on the F-group channels. Miami stated a decision had not been reached, as of March 1, 1988, as to a transmitter location and would not be reached until the ITFS licensee agreed to accommodate the operation of an MMDS station on the F-group channels.

3. On March 24, 1988, the DFD denied Miami's request for additional time to construct on the grounds that it had not been diligent in its efforts to construct the proposed station.[1] The DFD found that the need for additional time was not due to circumstances beyond the applicant's control, or that there were unique and overriding public interest concerns to justify the requested extension, as required by Section 21.40 (b) of the Commission's rules, 47 C.F.R. § 21.40. The DFD concluded that construction was delayed due to Miami's exercise of its "independent business judgment, rather than [to factors] beyond [its] control...", and therefore, an extension of the construction period was unjustified. Based on these findings, Miami was instructed to submit the construction authorization for immediate cancellation, but was encouraged to reapply once its business plan had been determined and negotiations completed.

4. Miami filed a petition for reconsideration of the DFD's findings on April 21, 1988. Seven days later, on April 28, 1988, Miami filed a certification of completion of construction, FCC Form 436 (now referred to as FCC Form 494-A) for MDS station WLK230. On reconsideration, the DFD affirmed its earlier findings on the grounds that Miami had not demonstrated any factual or legal error by the DFD to support reversal of the prior denial for additional time. The DFD found that Miami offered no explanation of its past actions. Rather, Miami had offered statements of assurance that construction would proceed at the present site, and suggested that relocation of the station could be accomplished at a later date. Miami was reminded that an applicant's independent business judgment to delay construction for financial reasons would not justify an extension of time because judgments of this nature are treated as being within the applicant's control.[2]

5. In addition, the staff found that, despite the March 24, 1988 denial of Miami's extension application and the termination of the construction authorization on March 1, 1988 (which was confirmed in the March 24, 1988 letter), Miami had proceeded to construct the station as evidenced by the submission of a certification of completion of construction on April 28, 1988. Based on the documentation submitted (FCC Form 701, petition for reconsideration, and certification of construction completion), the staff found Miami had engaged in construction activity between March 2, 1988 and April 28, 1988, in violation of Section

[1] Letter from Chief, Domestic Radio Branch, DFD to Mr. W. Randolph Young, Attorney, File No. 50121-CM-MP-98, (March 24, 1988).

[2] Letter from T. Reideler, Senior Attorney, Domestic Radio Branch, DFD to Mr. W. Randolph Young, Attorney, File No. 50121-CM-MP-88 (April 27, 1988).

319 of the Communications Act of 1934, that requires Commission authority prior to construction, and the Commission's rules prohibiting construction without prior authority. *See* Sections 21.3(a), 21.7, and 21.43(a), 47 C.F.R. §§ 21.3(a), 21.7 and 21.43(a). Having found that unauthorized construction did occur, the DFD issued a Notice of Apparent Liability, pursuant to 47 U.S.C. §§ 503(b)(1) and 503(b)(2) of the Act, to Miami for willful and repeated violations of the Act and the Commission's rules regarding unauthorized construction and assessed a monetary forfeiture in the amount of $2,000 for these violations.[3]

6. *Boston MDS Company*. Boston MDS Company (Boston), a joint venture composed of Digital Paging Systems, Inc., Private Networks, Inc., Midwest Corporation, and Multipoint Information Systems, Inc., was granted an initial MDS construction authorization on November 7, 1985, with a construction completion date of July 7, 1986. Upon application filed July 7, 1986, Boston was granted an extension of time until October 7, 1986 to complete construction. Boston filed a second extension request on October 7, 1986 which was granted extending the construction deadline to December 7, 1986. This was followed, on December 4, 1986, by an application to modify Boston's construction authorization to change its proposed transmitter location. On June 24, 1987, Boston filed a second application to modify its construction authorization in order to change again transmitter location. On August 21, 1987, this modification application was granted with a construction completion date of April 21, 1988, the fourth extension granted to Boston. On April 21, 1988, Boston filed a fifth extension application alleging that additional time was needed because it was advised, on March 16, 1988, that the site was no longer available. Boston then instructed the equipment manufacturer to delay delivery of equipment. However, on April 15, 1988, Boston received notification from the site leasing agent that the site was now available. Boston then instructed the equipment manufacturer to deliver the equipment within the next 90 days.

7. On May 3, 1988, the DFD denied Boston's extension application finding that it had not been diligent in its efforts to construct the proposed station and that the failure to construct was not due to circumstances beyond the applicant's control. The staff noted that it was indeed unfortunate that for approximately one month out of the last authorized construction period, Boston had lost its proposed site. However, the staff observed that Boston could have taken measures to secure protection from loss of this site by execution of a lease or lease option agreement. Based on these considerations, the DFD concluded that an extension was not warranted and instructed Boston to submit the construction authorization for immediate cancellation.[4]

8. On May 31, 1988, Boston filed a petition for reconsideration of the DFD's denial of the extension application, and on June 27, 1988, it filed a certification of completion of construction. Boston's request for reconsideration was denied on the basis that it had not shown any factual or legal error in the DFD's earlier finding to justify reversal of the denial decision.[5] The DFD also found that, although Boston's extension application was denied on April 28, 1988, and Boston had been instructed to submit the authorization for immediate cancellation, Boston had proceeded to construct the station as evidenced by the submission of a certification of completion of construction nearly two months later on June 27, 1988. The staff, therefore, concluded that Boston had engaged in construction without authority in violation of Section 319 of the Act and Sections 21.3(a), 21.7, and 21.43(a) of the Commission's rules, and issued a Notice of Apparent Liability in the amount of $2,000 for Boston's willful and repeated violations of the Act and the Commission's rules against unauthorized construction. Boston was also again instructed to submit the construction authorization for cancellation.[6]

9. Miami and Boston (collectively referred to as "Petitioners") filed Applications for Review contending that the DFD's decisions on reconsideration denying their extension applications should be reversed because the staff's actions did not consider the fact that both stations had been constructed by the time the reconsideration decisions were rendered. Petitioners argue that because the stations were constructed and ready for operation at the time the reconsideration decisions were issued, the factual bases for denying the extensions -- failure to construct -- were non-existent.

10. Alternatively, Petitioners maintain that the mere filing of the extension requests tolled the expiration of the construction authorizations. Consequently, they argue, construction of the facilities after the expiration of the construction period and during the reconsideration period was under color of legal authority.

DISCUSSION

11. Section 319(a) of the Communications Act of 1934, as amended, provides, *inter alia*, that no license shall be issued under the authority of this Act for the operation of any station, unless, where required, a construction authorization has been granted by the Commission. Subsection 319(b) further provides that a construction authorization will be automatically forfeited if the station is not ready for operation within the time specified in the construction authorization, or such further time as the Commission may allow, unless prevented by causes not under the control of the grantee.

12. It has been the Commission's experience that timely construction of facilities does not always occur, particularly with regard to single-channel MDS facilities. In 1986, Commission records revealed that when at least one request for a construction extension or modification was granted for a single-channel Multipoint Distribution Service (MDS) station, the average construction period was 28 months, or an increase of 350% over the eight-month initial construction period then provided.[7] Carriers who

[3] *Id.*

[4] Letter from Chief, Domestic Radio Branch, DFD, to Mr. W. Randolph Young, Attorney, File No. 50149-CM-MP-88 (May 3, 1988).

[5] Letter from T. Reideler, Senior Attorney, Domestic Radio Branch, DFD to Mr. W. Randolph Young, Esq. (File No. 50149-CM-MP-88) (May 25, 1989).

[6] *Id.*

[7] *See* Revision of Part 21, (Notice of Proposed Rulemaking), 104 FCC 2d 116 (1986).

fail promptly to construct facilities preclude other applicants who are willing, ready, and able to construct from access to limited and valuable spectrum. This has the effect of delaying, or even denying, service to the public. *Revision of Part 21 of the Commission's Rules*, 2 FCC Rcd 5713 (1987). In order to ensure timely construction of facilities, the Commission announced its intent to enforce strictly construction deadlines for stations authorized under Part 21 of the Commission's Rules when it established a construction period of 12 months for MDS in 1987. *Id.* The Commission emphasized that a station would be expected to be placed into operation within the twelve month construction period. Any licensee desiring to extend the construction period would be required to file an application to do so and to satisfy the specific requirements for grant of a construction extension application established in Section 21.40(b) of the Commission's rules. Section 21.40(b) requires that an application for extension of a construction authorization must demonstrate that the licensee has made diligent efforts to construct *and* that (1) additional time is due to circumstances beyond that applicant's control, or (2) there are unique and overriding public interest concerns that justify such an extension. The rule section expressly provides that extensions will not be granted for delays caused by lack of financing or lack of site availability. Requests for additional time to construct are not routinely granted, and are treated on a case-by-case basis. *Id.* at 5721-22.

13. Under Part 21 of the Commission's rules, carriers may not commence construction until prior authority to construct is granted and construction must be completed by the date specified in the construction authorization as the termination date of the construction period. *See* 47 C.F.R. § 21.43(a). The rules explicitly state that failure to construct within the specified construction period and to file a certification of construction completion, no later than 5 days after construction is completed, will result in the automatic forfeiture and termination of the station authorization. 47 C.F.R. § 21.44 (a)(1). An applicant takes a construction authorization subject to compliance with the terms and conditions of authorization set forth in rule sections 21.43(a) and 21.44(a)(1). Acceptance of the construction authorization constitutes accession to these conditions. *Cf. P R Temmer v FCC*, 743 F.2d 918 (D.C. Cir. 1984); *Music Broadcasting Co. v FCC*, 217 F.2d 339 (D.C. Cir. 1954).

14. Petitioners do not advance any argument to warrant reversing the DFD's initial decisions denying Petitioners last extension requests. Moreover, we find that the DFD's decision properly concluded that Boston and Miami had not been diligent in constructing the facilities, the failure to construct had not been due to circumstances beyond the applicants' control, and there were no unique and overriding public interest concerns justifying an extension.

15. The issue for consideration is whether the DFD's decisions, on reconsideration, were in error. Petitioners principle argument is that the mere filing of the extension requests tolled the termination dates of the construction authorizations. Therefore, according to petitioners, the construction that occurred during the reconsideration period was legal.

16. We disagree with Petitioners and find no error in the DFD's reconsideration decisions. Compliance with Section 21.44, which requires timely construction and timely filing of a certification of construction completion, was a condition under which Petitioners took the construction authorizations. The consequence of failing to comply with this condition of authorization -- automatic forfeiture of the authorization -- is clearly set forth in that rule section. Petitioners had full knowledge of the condition and the consequence of failing to satisfy the condition. Although Section 21.44 provides for the automatic forfeiture of a construction permit, without further notice to the licensee by the Commission, Petitioners received actual notice of the staff's decision to deny the extension applications and were specifically instructed to submit the authorizations for cancellation. Yet, petitioners proceeded with construction. It is uncontroverted that construction of the Miami and Boston facilities occurred after the expiration of the construction period specified in the authorizations and after petitioners were notified of their licenses cancellation. Because the DFD did not extend the dates of expiration specified in the construction authorizations, Petitioners' failure to construct the facilities by the dates specified and to file the certifications of construction completion within the specified construction deadlines subjected both station licenses to automatic forfeiture upon the expiration of the construction deadlines under Section 21.44(a). Construction activity that occurred after March 1, 1988 by Miami and after April 21, 1988 by Boston was without Commission authority, in violation of Section 319(a) of the Act and Sections 21.3, 21.7, and 21.43(a) of the Commission's rules. Although petitioners chose to file the extension requests on the last day of the authorized construction periods, that decision had no legal effect on the termination dates specified in the construction authorizations and the resultant automatic forfeiture of the authorizations. Therefore, we find the DFD properly concluded that the licenses had been automatically forfeited and that the construction of both facilities was without authority.[8]

17. Under Section 21.44(b), a forfeited license may be reinstated if the Commission, in its discretion, determines that reinstatement would best serve the public interest, convenience, and necessity. Petitions for reinstatement will be considered if the petition, *inter alia*, "(2) explains the failure to timely file such notification or application as would have prevented automatic forfeiture; and (3) sets forth with specificity the procedures which have been established to insure timely filings in the future."

18. Petitioners have not persuasively demonstrated that reinstatement under §21.44(b) is in the public interest. Petitioners accepted the timely construction and filing of certifications of construction completion as conditions to acceptance of their authorizations as well as the automatic forfeiture consequence of their failure to do so. Without support and contrary to the provisions of Sections 21.40(b), 21.43, and 21.44, petitioners proceeded with con-

[8] Petitioners reliance on Mt. Baker Broadcasting Co., Inc., 3 FCC Rcd 4777 (1988) is misplaced. Here, as there, the staff had granted earlier extensions, but that does not affect the denial of further extensions.

struction after the expiration of the construction authorizations, and without obtaining further authority, even after they were specifically notified that their authorizations had expired. In addition, petitioners have not shown what steps have been taken to ensure timely filings in the future. Therefore, we cannot conclude that reinstatement of the authorizations is in the public interest. Under the circumstances here, reinstatement would undermine the Commission's intent to encourage permittees to construct authorized facilities in a timely manner. Moreover, Petitioners' conduct in constructing the facilities after notice of cancellation of their licenses and failure to satisfy § 21.44(b) provides no assurance that they would comply with our rules and regulations if the licenses were reinstated and petitioners became Commission licensees.[9]

19. Having concluded the staff properly denied the reconsideration of the applications for extensions of time, we next consider the Notices of Apparent Liability and the responses.

20. *Notices of Apparent Liability*. Because the staff concluded that construction of the Miami and Boston stations was unauthorized, Notices of Apparent Liability (NAL) in the amount of $2,000 each were issued against Miami and Boston for violating Section 319 of the Act and the Commission's rules against construction of facilities without prior authority. Miami and Boston filed responses to the NAL's requesting that the monetary forfeitures be set aside on the basis that construction was authorized, or alternatively, that the licensees did not act in "willful or knowing" disregard of the Act or the Commission's rules.

21. We have considered Petitioner's responses and conclude that no new evidence has been presented to persuade us that construction of both stations was authorized. We, therefore, affirm the staff's NALs. We are equally unpersuaded that Petitioners' actions were not in "willful" disregard of the Act and the Commission's rules or that imposition of a monetary forfeiture is not appropriate. Section 503(b)(1) of the Act authorizes the Commission to impose forfeiture penalties for "willful" or "repeated" violations of the terms and conditions of a Commission authorization or failure to comply with any provisions of the Act or the Commission's rules. *See also* 47 C.F.R. § 1.80(a)(1) and (a)(2). It is clear that Petitioners violated Section 319 of the Act and Sections 21.3(a) and 21.7 of the Commission's rules by constructing radio facilities after expiration of its authorization. Petitioners' actions were "willful" in that Petitioners' constructed the Miami and Boston stations. *See Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991). They were also "repeated" in that the activity appears to have been continued over a period of time of more than one day. In determining the amount of forfeiture to be imposed, the staff took into consideration the nature, circumstances, extent and gravity of the violations, and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require as prescribed by Section 503(b)(2)(D) of the Act and Section 1.80 (b)(3) of the Commission's rules. We observe that the forfeiture amount imposed by the staff is not excessive in contrast to other forfeitures imposed by the Commission for unauthorized construction. *See, e.g., MCI Telecommunications Corp.*, 3 FCC Rcd 509 (1988), *as supplemented*, FCC 88-49 (released February 18, 1988), *appeal pending sub nom. TeleSTAR, Inc. v. FCC*, No. 88-1153 (D.C. Cir.), ($10,000 forfeiture for premature construction of two antenna sites); *Yankee Celltel Co.*, Mimeo No. 30026 released March 7, 1986) ($8,500 forfeiture for unauthorized construction of an additional cellular cell site). Accordingly, we deny the requests for reconsideration of the NALs.

ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, that the Application for Review filed by Miami MDS Co. IS DENIED.

23. IT IS FURTHER ORDERED, that the Application for Review filed by Boston MDS Co. IS also DENIED.

24. IT IS FURTHER ORDERED, that Miami MDS Co. and Boston MDS Co., FORFEIT to the United States Government the sum of two thousand dollars ($2,000) each for violations of Section 319 of the Communications Act and Sections 21.3 and 21.7 of the Commission's Rules, 47 C.F.R. §§ 21.3 and 21.7, pursuant to Section 503(b) of the Communications Act. Payment may be made in the manner provided for in Section 1.80 (h) of our Rules within 30 days from the release of this Order.[10] If the forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection, in accordance with Section 504 (a) of the Communications Act.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

[9] We also disagree with Petitioners' assertion that authority obtained under their construction authorizations continues until such time as the DFD's decisions to deny their last extension applications become final. To support their contention, Petitioners refer to Section 558(c) of the Administrative Procedures Act which provides that when the "licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire until the application has been finally determined by the agency." 5 U.S.C. § 558(c). Construction of a station, in contrast to operation, is not an "activity of a continuing nature," so section 558(c) is inapplicable here. *See Bankers Life and Casualty Co. v. Callaway*, 530 F.2d 625, 634 n. 13 (5th Cir. 1976), *cert. denied*, 429 U.S. 1073 (1977) (dicta) ("filling land is not an activity of a continuing nature, but is instead a project that will end as soon as all the land is filled in. Radio broadcasting, in contrast, could conceivably go on indefinitely").

[10] Such a forfeiture amount should be paid by check or mail order drawn to the order of the Federal Communications Commission. The check or money order should be mailed to the Federal Communications Commission, Post Office Box 73482, Chicago, Illinois 60673-7482. Payment should identify the payor and reference the control number of the NAL.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CyberTel Cellular Telephone Company — Transmittal No. 1

Tariff F.C.C. No. 1

ORDER

Adopted: June 22, 1992; Released: June 23, 1992

By the Chief, Common Carrier Bureau:

1. On February 25, 1992, CyberTel Cellular Telephone Company (CyberTel) filed Transmittal No. 1 to establish charges to recover the costs of implementing equal access in its territory and the territories of its affiliated operating companies. The tariff primarily addresses presubscription procedures, and also contains two short sections regarding interconnection. An interexchange carrier (IXC) can interconnect with CyberTel either through a local exchange carrier (LEC) access tandem or on a direct connection basis. The IXC is required to provide its own facilities between its premises and the point of interconnection with CyberTel. The switched access rate for either type of connection is set at zero. The tariff is scheduled to take effect June 24, 1992.

2. On March 11, 1992, American Telephone and Telegraph Company (AT&T) filed a petition to reject or suspend and investigate CyberTel Transmittal No. 1. It alleges that CyberTel has failed, under Commission guidelines, to ballot and allocate[1] its customer base existing prior to CyberTel's acquisition by Ameritech.[2] AT&T also argues that, to avoid an over-recovery of CyberTel's costs, CyberTel's charge in its tariff to recover equal access conversion costs should be limited to 36 months to reflect CyberTel's estimated recovery period contained in its Description and Justification.[3]

3. On March 20, 1992, CyberTel filed its reply to AT&T's petition. CyberTel's reply centers on whether CyberTel must ballot and allocate its customers consistent with Commission procedures. CyberTel maintains that it has fulfilled its obligation to provide equal access under the divestiture decree[4] which does not require balloting and allocation.[5] CyberTel argues that the Commission's balloting and allocation requirements do not apply to cellular carriers. It maintains that the *Allocation Orders* referred only to landline telephone companies and have never been extended to cellular carriers.[6]

4. The Common Carrier Bureau has reviewed CyberTel Transmittal No. 1, the AT&T petition, and CyberTel's reply. The application of the Commission's equal access policies and procedures to cellular licensees raises issues beyond the scope of this transmittal and are more appropriately considered in the context of a more general proceeding.[7] Therefore, we conclude that the issues raised by AT&T herein do not warrant suspension or investigation of Transmittal 1 at this time.

5. Accordingly, IT IS ORDERED that the petition to reject or suspend and investigate CyberTel Cellular Telephone Company Tariff F.C.C. No. 1, Transmittal No. 1, filed by American Telephone and Telegraph Company, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

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[1] *See* In the Matter of Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase 1, 101 FCC 2d 911 (1985) (*Allocation Order) recon. denied*, 102 FCC 2d 503 (1985) (*Reconsideration Order);* Investigation of Access and Divestiture Related Tariffs, CC Docket 83-1145, Phase 1, 101 FCC 2d 935 (1985) (*Waiver Order); see also* Illinois Citizens Utility Board Petition for Rulemaking, Memorandum Opinion and Order, 2 FCC Rcd 1726 (Com. Car. Bur. 1987) (*Illinois CUB Order). See also* MTS and WATS Market Structure, Phase III, CC Docket No. 78-72, FCC 85-98, released Mar. 19, 1985 (extending equal access interconnection obligations to the Independent Telephone Companies).

[2] On November 14, 1991, the Ameritech Operating Companies (Ameritech) acquired CyberTel, which provides cellular service in the St. Louis, Missouri area. Prior to the closing, CyberTel's former owners spun-off the company's interexchange business into a new entity, Cellular Long Distance Service (CLDS). *See* CyberTel D&J at 4.

[3] AT&T Petition at 5. On June 22, 1992, CyberTel filed Transmittal No. 4, amending CyberTel Tariff F.C.C. No. 1, Transmittal No. 1, to provide that the equal access recovery charge will cease at 36 months, or earlier, if its costs have been recovered. *See* CyberTel Cellular Telephone Company, Tariff F.C.C. No. 1, Transmittal No. 4 (June 22, 1992). This amendment responds to AT&T's argument regarding this change.

[4] United States v. AT&T, 552 F. Supp. 226 (D.D.C. 1982), *aff'd sub nom.* Maryland v. United States, 460 U.S. 1001 (1983). *See also* United States v. Western Electric Co., CA No. 82-0192 (D.D.C. released September 12, 1990).

[5] CyberTel Reply at 2-3.

[6] CyberTel Reply at 8.

[7] *See, e.g.*, MCI Petition for Rulemaking, RM-8012 (filed June 2, 1992); FCC Public Notice, DA 92-745 (released June 10, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 26
F.C.C. No. 11	

ORDER

Adopted: June 23, 1992; Released: June 23, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 10, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 24, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 11 for AT&T Software Defined Network (SDN) Service.

2. On June 17, 1992 MCI Telecommunications Corporation (MCI) filed a petition to reject or, in the alternative, suspend and investigate Contract Tariff Transmittal No. 26.

3. The Common Carrier Bureau has reviewed AT&T Contract Tariff Transmittal No. 26 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to reject or, in the alternative, suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 11, Contract Tariff Transmittal No. 26 filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications	Contract Tariff
Contract Tariff	Transmittal No. 30
F.C.C. No. 12	

ORDER

Adopted: June 25, 1992; Released: June 25, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 12, 1992, AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective June 26, 1992 on 14 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing introduces Contract Tariff No. 12 for AT&T Software Defined Network (SDN) Service and Accunet Service.

2. On June 19, 1992 MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership filed petitions to reject or, in the alternative, suspend and investigate Contract Tariff Transmittal No. 30.

3. The Common Carrier Bureau has reviewed AT&T Contract Tariff Transmittal No. 30 and the relevant pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or, in the alternative, suspend and investigate AT&T Communications Contract Tariff F.C.C. No. 12, Contract Tariff Transmittal No. 30 filed by MCI Telecommunications Corporation and Sprint Communications Company Limited Partnership ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 4192
Tariff F.C.C. No. 2

ORDER

Adopted: June 30, 1992; Released: June 30, 1992

By the Chief, Tariff Division, Common Carrier Bureau:

1. On June 16, 1992 AT&T Communications (AT&T) filed the captioned tariff revisions which are scheduled to become effective July 1, 1992 on 15 days' notice pursuant to the Commission's *IXC Order*.[1] That Order establishes streamlined tariff review for filings that are presumed lawful. This filing expands the availability of a nationwide AT&T Megacom 800 Service promotion to all customers who order AT&T Megacom 800 Service.

2. On June 23, 1992 MCI Telecommunications Corporation (MCI) filed a petition to reject or suspend and investigate Transmittal No. 4192.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 4192 and MCI's petition. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petition to suspend and investigate AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 4192, filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Competition in the Interstate Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880, *reconsidered in part*, Memorandum Opinion and Order, 6 FCC Rcd 7569 (1991), *further recon.*, Memorandum Opinion and Order, FCC 92-181 (released Apr. 17, 1992).

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 91-35

In the Matter of

Policies and Rules Concerning
Operator Service Access and
Pay Telephone Compensation

ORDER ON RECONSIDERATION

Adopted: June 23, 1992; Released: July 10, 1992

By the Commission: Commissioner Marshall issuing a statement.

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I. INTRODUCTION

1. We have before us five petitions for reconsideration or clarification of policies and rules we recently adopted concerning consumer access to operator service providers (OSPs) and compensation for competitive public payphone owners for calls not utilizing their presubscribed OSPs.[1] For the reasons set forth below, we reaffirm that: (1) call aggregators must allow consumers to use equal access ("10XXX") codes according to the schedule described in our original *Report and Order*, with certain clarifications; (2) all OSPs, except those exempted herein, must establish an 800 or 950 access number within six months of the effective date of our previously adopted rules; and (3) calls initiated with an 800 number that does not serve as an OSP's access code are not within the scope of the statutory provision that required us to consider payphone compensation. We grant, however, the request to order local exchange carriers (LECs) to offer blocking and screening services designed to control potentially fraudulent 10XXX calling, and we defer certain unblocking deadlines pending the deployment of these services.

II. BACKGROUND

2. The impetus for the Commission's proceedings on operator service issues was the set of problems that arose with the entry of competitors into the operator services[2] marketplace following the divestiture of AT&T. Both network-based OSPs and companies that combine their own operator service elements with the leased telephone lines of other carriers began to compete for presubscription contracts that allowed them to provide operator services

[1] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Report and Order and Further Notice of Proposed Rule Making, 6 FCC Rcd 4736 (1991) (hereinafter *Report and Order*). The *Further Notice* portion of this document sought comment on compensation matters that are not at issue here. The Commission subsequently released a Second Report and Order in this docket that addressed these compensation matters. *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Second Report and Order, FCC 92-170 (released May 8, 1992).

[2] The term "operator services" refers to "any interstate telecommunications service initiated from an aggregator location that includes, as a component, any automatic or live assistance to a consumer to arrange for billing or completion, or both, of an interstate telephone call through a method other than -- (A)

for call aggregators.[3] A caller using an aggregator's telephone is automatically connected to the presubscribed OSP unless an access code[4] is dialed.

3. Widespread consumer dissatisfaction over the rates and practices of many OSPs led the Commission to address operator service problems in a general rule making proceeding, CC Docket No. 90-313.[5] During the first comment period in CC Docket No. 90-313, Congress passed the Telephone Operator Consumer Services Improvement Act of 1990, which added Section 226 to the Communications Act of 1934.[6] Section 226(e) required this Commission to conduct a separate rule making proceeding to address operator service access and payphone compensation issues. Regarding access, we were to determine whether: (a) call aggregators should be required to allow consumers to use 10XXX access codes; or (b) all OSPs should be required to establish an 800 or 950 access number; or (c) both (a) and (b).[7] As for compensation, the Act required us to consider the need to prescribe compensation for competitive public payphone owners for "calls routed to providers of operator services that are other than the presubscribed provider of operator services for such telephones.[8]

4. On March 11, 1991, we released a Notice of Proposed Rule Making that initiated the separate proceeding on access and compensation issues, CC Docket No. 91-35.[9] After consideration of the extensive public comments on our access and compensation proposals, we adopted a *Report and Order* on July 11, 1991. In it, we concluded that "universal 10XXX access should be our long-term goal because it is the most efficient access method for consumers to use in reaching their preferred operator service providers."[10] We also found that "[r]equiring aggregators to allow 10XXX access will enhance consumer choice because consumers will then be able to use all established access methods to reach their OSPs of choice."[11] Consistent with these conclusions, we adopted rules requiring aggregators to unblock 10XXX access according to the type and capabilities of their equipment and the cost of modifying their equipment to process 10XXX dialing sequences selectively.[12] Specifically, aggregators who provide payphones must unblock 10XXX access within six months of the effective date of the new rules. Aggregators who use nonpayphone equipment that can selectively process 10XXX dialing sequences[13] must unblock within six months or upon installation of such equipment, whichever is sooner. Aggregators who install equipment manufactured or imported on or after April 17, 1992, must unblock 10XXX access upon installation of such equipment. Those aggregators who can modify their equipment for no more than $15.00 per line to selectively process 10XXX access must unblock within eighteen months. Finally, all other aggregators must unblock 10XXX access no later than April 17, 1997. We also required the establishment of 800 or 950 access numbers by all OSPs within six months so as to provide an access method for consumers at aggregator locations where 10XXX access either is temporarily unavailable during the unblocking period or is technologically impossible because the telephone is served by a central office that has not converted to equal access.[14] In addition, we determined that considerations of equity required us to prescribe compensation for competitive public payphone owners for access code calls.[15]

5. Five petitions for reconsideration or clarification were filed following the release of our *Report and Order*. In response to the petitions, several parties filed oppositions, comments, and reply comments.[16] APCC also filed two motions, one requesting that we partially stay the 10XXX unblocking requirements until we rule on certain issues raised in the APCC reconsideration petition, and a second requesting that we stay the 800/950 requirement for a specified group of OSPs until we determine whether the

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automatic completion with billing to the telephone from which the call originated; or (B) completion through an access code used by the consumer, with billing to an account previously established with the carrier by the consumer." 47 U.S.C. § 226(a)(7); *accord* 47 C.F.R. § 64.708(g).

[3] An "aggregator" is "any person that, in the ordinary course of its operations, makes telephones available to the public or to transient users of its premises, for interstate telephone calls using a provider of operator services." 47 U.S.C. § 226(a)(2); 47 C.F.R. § 64.708(b). Aggregators include hotels and motels, hospitals, universities, airports, gas stations, pay telephone owners, and others. Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313: Report and Order, 6 FCC Rcd 2744, 2752 (1991) (hereinafter *90-313 Report and Order*), Order on Reconsideration, FCC 92-247 (released June 18, 1992); S. Rep. No. 439, 101st Cong., 2d Sess. 10 (1990) (Committee report on the Telephone Operator Consumer Services Improvement Act of 1990) (hereinafter *Senate Report*).

[4] An "access code" is a sequence of numbers that, when dialed, connects the caller to the operator service provider associated with that sequence. 47 U.S.C. § 226(a)(1); 47 C.F.R. § 64.708(a). An "equal access code" is an access code that allows the public to obtain an equal access connection to the carrier associated with that code. 47 U.S.C. § 226(a)(6); 47 C.F.R. § 64.708(f). "Equal access" has the meaning given that term in Appendix B of the Modification of Final Judgment entered August 24, 1982, in United States v. Western Electric, Civil Action No. 82-0192 (United States District Court, District of Columbia), as amended by the court in its orders issued prior to the enactment of 47 U.S.C. § 226. 47 U.S.C. § 226(a)(5); 47 C.F.R. § 64.708(e). We will use "10XXX code" interchangeably with "equal access code."

[5] *See generally 90-313 Report and Order.*

[6] Pub. L. No. 101-435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226) ("Act"). The President signed the Act into law on October 17, 1990.

[7] 47 U.S.C. § 226(e)(1).

[8] *Id.* § 226(e)(2).

[9] Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Notice of Proposed Rule Making, 6 FCC Rcd 1448 (1991) (hereinafter *NPRM*).

[10] *Report and Order*, 6 FCC Rcd at 4738.

[11] *Id.* at 4739.

[12] *See id.* at 4738-43, 4750-51 (47 C.F.R. § 64.704(c)).

[13] Aggregator equipment has "selective" 10XXX capabilities if it is technologically capable of identifying the dialing of a 10XXX code followed by any sequence of numbers that will result in billing to the originating telephone and is, at the same time, technologically capable of blocking access through such dialing sequences without blocking access through other dialing sequences involving 10XXX codes. *See* 47 C.F.R. § 64.704(c).

[14] *Report and Order*, 6 FCC Rcd at 4744.

[15] *Id.* at 4745.

[16] Appendix A lists the parties participating, as well as the abbreviations we use throughout this Order to refer to those parties.

requirement should be waived for such OSPs.[17] We adopted an order granting the motions[18] and will address the related substantive issues herein.

III. DISCUSSION

A. 10XXX Access.

1. Whether 10XXX unblocking should be required.

6. *Petitions and comments.* ACE and ACUTA argue that our decision to require 10XXX unblocking according to a specified schedule was arbitrary and capricious because much aggregator equipment now in use cannot process 10XXX dialing sequences and will have to be replaced or modified at costs that will be burdensome to the aggregators.[19] They further maintain that by ordering the unblocking of 10XXX access, we have increased the likelihood of fraudulent calling and have thus neglected our obligation under Section 226(g) of the Act to "require such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud."[20] ACE and ACUTA also assert that 10XXX unblocking is unnecessary because consumers will have access to their preferred OSPs via the 800 or 950 access numbers that all OSPs must establish under our new rules.[21]

7. ACE raises three additional arguments regarding our overall decision on 10XXX access. First, ACE claims that there is no reasonable basis for our conclusion that 10XXX dialing should be unblocked because it is an efficient access method.[22] According to ACE, it is actually inefficient to require 10XXX unblocking because of the equipment modification or replacement costs and the wastefulness of toll fraud that will result from unblocking. ACE also notes that 10XXX can never be a "universal" access method until non-equal access areas are converted and all OSPs actually offer 10XXX access. Next, ACE challenges our assertion that the 10XXX unblocking decision is consistent with the statutory provision,[23] that requires new aggregator equipment to have selective 10XXX capabilities.[24] Finally, ACE argues that our use of the Internal Revenue Service (IRS) five-year depreciation period[25] as a partial basis for the unblocking schedule does not take into account those non-profit aggregators, such as colleges and universities, that do not depreciate their equipment according to the IRS schedule but, instead, have an incentive to use their equipment as long as possible.[26]

8. AT&T responds that changes in our 10XXX ruling would deprive end users of access not only to AT&T, but also to other OSPs that offer 10XXX access.[27] AT&T states that the petitions overestimate the cost of modifying equipment to unblock and that LEC blocking and screening services can effectively control fraudulent 10XXX calling.[28] Epic Healthcare, however, supports the ACE and ACUTA arguments, agreeing that equipment modification and LEC services associated with unblocking will be very expensive.[29] Epic also argues that our 10XXX unblocking requirements effect an unconstitutional "taking" under the Fifth Amendment of the United States Constitution because these provisions require modification or replacement of "useful and valuable" aggregator equipment without providing compensation to the aggregator for the appropriation of its right to use of its property.[30] A result of such requirements is, according to Epic, an impairment of the aggregator's investment-backed expectations.[31] Epic contends that our requirements bear "no reasonable relation" to the purpose of the Act and benefit a private party, AT&T.[32] In addition, Epic agrees with the arguments that the statutory provision regarding equipment capabilities, Section 226(f), does not give us the authority to require equipment modification or replacement and that equipment should be replaced only through natural attrition.[33] Epic further states that like colleges and universities, its health care facilities do not follow the IRS depreciation schedule. Finally, Epic maintains that unblocking 10XXX access, unlike allowing 800 and 950 access, would expose its facilities to an undue risk of fraud, in violation of Section 226(g) of the Act.[34]

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[17] *See* Motion for Partial Stay, filed January 6, 1992 (requesting partial stay of 47 C.F.R. § 64.704(c) as applied to payphones without availability of certain blocking and screening services); Motion for Stay, filed January 31, 1992 (requesting stay of 47 C.F.R. § 64.704(d) as applied to store-and-forward OSPs). In addition, other parties requested a stay of the 10XXX unblocking requirements pending decisions on their individual petitions for waiver of the unblocking requirements. These stay requests were addressed with the APCC motion. The petitions for waiver will be addressed separately. *See* Public Notices, DA 92-785, DA 92-786 (released June 23, 1992) (seeking comment on petitions for waiver of 10XXX unblocking requirements).

[18] *See* Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35: Order, 7 FCC Rcd 2146 (1992). As stated in the Order, this stay was to remain in effect until we ruled on the related substantive issues, which we do herein. Accordingly, the stay is lifted effective six months from the release of this Order on Reconsideration, subject to the unblocking schedule set forth in paragraph 23.

[19] Petition of ACE at 3; Petition of ACUTA at 3-6, 8. We decline to address ACUTA's argument that colleges and universities are not aggregators. *See* Petition of ACUTA at 2 n.5. Issues regarding the definition of "aggregator" are not properly before us in this docket. ACUTA has, however, filed a petition asking us to clarify this definition. *See* Public Notice, DA 92-250, 7 FCC Rcd 1926 (1992). In addition, on May 20, 1992, the Federation of American Health Systems (FAHS) filed a "Petition for Declaratory Ruling or, in the Alternative, Petition for Waiver" in CC Docket Nos. 90-313 and 91-35 regarding the aggregator status of patient room telephones in health care facilities and the unblocking obligations of such facilities that have small volumes of interexchange calls. We will address the latter ACUTA petition and the FAHS petition separately from the instant proceeding.

[20] Petition of ACE at 4, 8, 17; Petition of ACUTA at 6-7 (even LEC services or toll restrictors cannot adequately control fraudulent 10XXX calling).

[21] Petition of ACE at 16-17; Petition of ACUTA at 8.

[22] Petition of ACE at 5-11.

[23] *See* 47 U.S.C. § 226(f) (aggregator equipment manufactured or imported on or after April 17, 1992); *see also* 47 C.F.R. § 68.318(d).

[24] Petition of ACE at 12-14, 18 (FCC has previously allowed replacement of equipment by attrition when policies changed).

[25] *See* I. R. C. § 168(e), (i).

[26] Petition of ACE at 21-22.

[27] Opposition of AT&T at 3.

[28] *Id.* at 5-6.

[29] Comments of Epic at 3-4.

[30] *Id.* at 9-12.

[31] *Id.* at 10.

[32] *Id.* at 10-12.

[33] *Id.* at 14-15.

[34] *Id.* at 18.

9. In reply, the Joint Higher Education Parties point out that it is undisputed that much aggregator equipment in use today cannot process 10XXX dialing sequences, regardless of the LEC services or toll restrictors that are available.[35] They also contend that, at $15.00 per line, 10XXX unblocking costs will be much higher than predicted by AT&T and that increased toll fraud will result from unblocking.[36]

10. *Decision.* We decline to alter our threshold determination that 10XXX is an efficient form of access that consumers should be able to use when choosing their preferred OSPs. The ready availability of 10XXX access, along with 800 and 950 access,[37] will allow consumers to use any of the established access methods when exercising their right of choice among OSPs. We were aware, when we adopted our unblocking rules, that some aggregator equipment, as noted by ACE and ACUTA, would not be able to process 10XXX dialing sequences unless the equipment was modified or replaced by the aggregator. We have sought to minimize any associated financial burden, however, by prescribing a cost limit for modification that we think is modest and reasonable, and by tying that cost limit to the phased unblocking schedule. While the total modification cost might be large, at $15.00 per line, for an aggregator with a system containing many lines, the actual per line cost would still be small enough to be recovered easily from the users of those lines. In addition, many aggregators may be able to unblock at a cost that is substantially less than our per line limit. Further, we disagree with the petitioners' claim that we have neglected our obligation under Section 226(g) to take actions that will ensure that aggregators are not exposed to undue risk of fraud. Our phased unblocking schedule has, as a basis, the fraud prevention capabilities of aggregator equipment. Only when an aggregator's equipment can reasonably be expected to have selective 10XXX capabilities that can screen potentially fraudulent 10XXX dialing sequences will the aggregator be expected to unblock.[38] We also disagree with the petitioners' assertion that the availability of 800 and 950 access makes 10XXX unblocking unnecessary. Our stated intention in this proceeding is "to ensure that consumers have the opportunity to choose freely among the available interstate operator services.[39] This being our paramount concern, we think it essential that consumers have a reasonable amount of discretion to use whatever access methods they prefer, without limitations by aggregators.

11. We also find the additional arguments raised by ACE without merit. ACE challenges our conclusion that 10XXX access is efficient, stating that unblocking costs and toll fraud are inefficiencies related to 10XXX access. This argument fails, however, to address the efficiencies of 10XXX for the consumer that we identified: the shorter dialing sequence, five digits, compared to other access methods, which have seven and eleven digits; and the ability of the consumer to dial the called number immediately after the 10XXX code without waiting for an additional prompt, as is necessary with 800 and 950 access.

12. Further, ACE has misconstrued the effect on our decision of the statutory requirement that new aggregator equipment have selective 10XXX capabilities. We did not contend in the *Report and Order* that this statutory provision required 10XXX unblocking for existing aggregator equipment. On the contrary, we acknowledged that Congress did not intend this provision to prejudge our decision on the 10XXX issue, but we noted that the legislative history clearly indicated that 10XXX access should be universally available in the future.[40] We concluded that "during the period of transition to the eventual use of such [new] equipment by all aggregators, 10XXX access should be available to the extent possible."[41] We still view this conclusion as beneficial to consumers and as consistent with, though not required by, the statutory provision regarding the 10XXX capabilities of new equipment.

13. In addition, ACE argues that not all aggregators schedule their equipment replacement according to the IRS depreciation schedule and that it is therefore unreasonable for us to base our unblocking requirements on that schedule. Given the IRS schedule, we think it reasonable to conclude that most aggregators who do not fall into the other 10XXX unblocking categories will depreciate their equipment over the prescribed period and can then be expected to unblock without undue burden, even if equipment replacement is necessary. The long phased-in unblocking period that we have adopted affords aggregators, carriers, and equipment manufacturers considerable time to develop economical methods for unblocking 10XXX access that do not subject aggregators to undue risk of fraud. While we accept the contention that not all aggregators have incentives to follow the IRS schedule, we cannot allow the judgments of individual aggregators to deter us from our primary goal and statutory duty in this proceeding: the protection of the consumer's right to choose among the available operator services. Further, any categorical exception to our unblocking provisions for non-profit aggregators, as requested by ACE, would require us to determine, *inter alia*, the proper definition of "non-profit," whether the exception should apply to all or only some non-profit aggregators, and whether the revenues recovered by such aggregators from their phone systems should affect their unblocking obligations. The record currently before us does not provide a sufficient basis for addressing such issues. We also note that the Commission is now considering whether to adopt a "billed party preference" method of providing access to operator

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[35] Reply of the Joint Higher Education Parties at 2-3. The Joint Higher Education Parties include all of the parties who were signatories of the ACE and ACUTA petitions.

[36] *Id.* at 3-4.

[37] *See* 47 U.S.C. § 226(c)(1)(B) (aggregators must ensure the availability of 800 and 950 access); *accord* 47 C.F.R. § 64.704(a).

[38] We have explicitly allowed blocking of 10XXX dialing sequences that always result in billing to the originating phone. 47 C.F.R. § 64.704(c)(6); *see also Report and Order*, 6 FCC Rcd at 4743. This provision does not, however, exempt payphones employing store-and-forward devices from our unblocking requirements, although these phones may allow operator service calls that are, in a sense, billed to the originating phone. We have made a minor modification in Section 64.704(c)(6) to clarify this obligation.

[39] *Report and Order*, 6 FCC Rcd at 4739; *NPRM*, 6 FCC Rcd at 1452.

[40] *Report and Order*, 6 FCC Rcd at 4740 (citing the Senate committee report on the Act).

[41] *Id.*

services.[42] If we were to adopt such a scheme, we might be open to arguments that we should reconsider the balance we have struck here in favor of requiring 10XXX unblocking within five years. In light of these considerations, we decline at this time to alter our reliance on the IRS depreciation schedule as a basis for the final 10XXX unblocking deadline. We are not averse, however, to entertaining additional arguments and evidence that are relevant to the issue of whether particular non-profit aggregators should be treated differently from other aggregators. We also have the discretion to waive our unblocking rules where particular facts, such as undue hardship or low toll revenues, would make strict compliance inconsistent with the public interest.[43] In appropriate cases, therefore, we are willing to consider requests from non-profit aggregators for waivers of our 10XXX unblocking requirements.

14. Finally, we disagree with Epic's contention that our 10XXX unblocking requirements effect an unconstitutional "taking" without compensation under the Fifth Amendment. In scrutinizing government regulations under the Fifth Amendment, the Supreme Court has said that "several factors are particularly significant -- the economic impact of the regulation, the extent to which it interferes with investment-backed expectations, and the character of the governmental action."[44] While a "'taking' may be more readily found" when the action can be characterized as a "physical invasion," the Court has "often upheld substantial regulation of an owner's use of his own property where deemed necessary to promote the public interest."[45] The Court has generally distinguished physical invasion of property from regulation that "merely restricts the use of property."[46] Applying these factors, we find that no unconstitutional taking occurs under our 10XXX unblocking requirements. The economic impact of compliance with our new rules will be modest because we have set a cost limit of $15.00 per line for equipment modifications during the first eighteen months of the unblocking period. Any non-payphone aggregators who cannot unblock 10XXX access within this cost limit will be able to use their equipment for the applicable IRS depreciation period. This will enable aggregators to recover fully their capital and, thus, allow full satisfaction of their reasonable investment-backed expectations before more extensive modification or equipment replacement is required.[47] Further, there is no question of a physical: appropriation of property under these rules. Instead, our requirements merely restrict uses of aggregator equipment that Congress and this Commission have deemed to be contrary to the public interest.[48] Acting pursuant to a statutory provision, we have adopted rules that prevent aggregators from using their equipment to impair consumers' freedom of choice in the operator services marketplace. Our requirements are "reasonably adapted" to promote the public interest and the purpose of the Act by ensuring that consumers can reach their OSPs of choice.[49] As for the argument that these requirements are for the private benefit of AT&T, we note the uncontested fact that several other OSPs also employ the 10XXX access method. In any event, our 10XXX unblocking requirements are intended to benefit consumers, with any benefits to OSPs being merely incidental.

2. Local exchange carrier blocking and screening services.

15. *Petitions and comments.* APCC and NATA argue that we erred by not ordering the LECs to offer blocking and screening services that would assist aggregators in preventing fraudulent 10XXX dialing.[50] In the *Report and Order*, we recognized the value of such services and encouraged the LECs to offer them to the extent that aggregators desired them.[51] But we concluded that because of uncertainties associated with aggregator demand for the services and with the cost and timing of the services' implementation, it would be inappropriate to make the provision of such services mandatory.[52] APCC and NATA argue that this conclusion violated our statutory obligation under Section 226(g) to ensure that aggregators are not exposed to undue risk of fraud. APCC contends that the legislative history evinces an intent that LECs be required to participate in fraud prevention and that the record does not indicate that they will do so voluntarily.[53] APCC further maintains that its proposed LEC services can be implemented quickly and inexpensively at equal access central offices and that our *Report and Order* rejected these proposals without distinguishing them from the LEC services suggested by AT&T.[54] APCC also asserts that aggregators will subscribe to these services, regardless of any equip-

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[42] *See* Billed Party Preference for 0+ InterLATA Calls, CC Docket No. 92-77: Notice of Proposed Rule Making, 7 FCC Rcd 3027 (1992).

[43] WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *see also* Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); 47 C.F.R. § 1.3 (must show "good cause" for waiver).

[44] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432 (1982) (*Loretto*); *accord* Penn Central Transportation Co. v. New York City, 438 U.S. 104, 124 (1978).

[45] *Loretto*, 458 U.S. at 426.

[46] *Id.* at 430.

[47] We note that Epic has based its estimates of modification or replacement costs on the April 1997 unblocking deadline, which encompasses the full IRS depreciation period. Comments of Epic at 3-4. Beyond such estimates, the record contains only speculative and undocumented projections of modification or replacement costs. *See* Petition of ACUTA at 5-6 (many of the surveyed aggregators were unable to estimate costs); Petition of ACE at 14-16 (non-aggregator phones included in cost estimate).

[48] *See Senate Report* at 1 (purpose of Section 226 is to protect consumers from anticompetitive practices).

[49] *See* Trinity Methodist Church, South v. Federal Radio Comm'n, 62 F.2d 850, 853 (D.C. Cir. 1932) (to be constitutional, requirements must be reasonably adapted to secure the purposes and objects of regulation); *see also Loretto*, 458 U.S. at 426 (regulation of property often upheld where deemed necessary to promote the public interest).

[50] Petition of APCC at 8-17; Petition of NATA at 3-5. Blocking services automatically prevent completion of calls initiated via specified dialing sequences. Screening services indicate to OSPs any billing restrictions on the line to which a caller wishes to bill a call.

[51] *Report and Order*, 6 FCC Rcd at 4741.

[52] *Id.*

[53] Petition of APCC at 8-10.

[54] *Id.* at 10-12, 13-14 (mandatory LEC services should also include a so-called "PIC-none" option, under which aggregators can indicate to the LEC that there is no presubscribed "primary interexchange carrier" that a caller can reach without dialing an access code).

ment-based fraud prevention measures that are also available.[55] In its petition, NATA argues that our 10XXX unblocking requirements should be deferred until adequate LEC services are in place.[56] NATA maintains that the record indicates that 10XXX fraud cannot be prevented in the absence of such services and that such services are currently feasible.[57]

16. In response, the LEC commenters support our original decision not to require them to provide the services suggested by APCC and NATA. Southwestern Bell argues that the "cost causers" -- aggregators -- and not the LECs or their customers, should be responsible for fraud control.[58] Ameritech cites the potentially high costs of the services, the unknown number of subscribers, and the delay in unblocking while the services are being deployed, as reasonable bases for our original decision.[59] Ameritech also asserts that neither Section 226(g) nor the legislative history supported the idea of mandatory LEC services: the House committee report on the Act only discussed "appropriate" actions by carriers.[60] BellSouth notes that the petitioners' arguments on this subject have already been addressed fully by the Commission.[61] In any case, BellSouth says that it is already offering certain central office services, but that any expansion in services would require significant expenditures and development time, without any guarantee of new subscribers.[62] NYNEX maintains that equipment-based fraud controls, not mandatory LEC services, are most appropriate.[63] United Telecommunications challenges the assertion that all equal access central offices can currently offer the services suggested by APCC and NATA.[64]

17. Several aggregators and other parties filed comments in support of the APCC and NATA arguments for mandatory LEC services, generally offering the same reasons set out in the petitions.[65] In its reply, APCC notes that aggregators are willing to pay for LEC services but that the LECs should have some responsibility for controlling fraud occurring in their networks.[66]

18. *Decision.* Upon reconsideration of this issue, we conclude that we should require local exchange carriers to offer certain blocking and screening services. While it is still our view that both the plain language of Section 226(g) and the legislative history cited by APCC leave the matter of mandatory LEC services wholly within our discretion, we are now persuaded that the usefulness of these services in preventing 10XXX fraud outweighs any uncertainties associated with them. As already noted, we recognized the value of these services in our original decision but concluded that uncertainties regarding the cost and timing of the services' implementation, as well as the demand for them, counseled against requiring them. In the earlier portions of this proceeding, however, cost estimates and arguments regarding demand and timing were directed at proposals involving an interrelated and potentially complex menu of LEC services, such as the "split 1+" blocking feature developed for the LECs by AT&T, which blocked both domestic and international dialing sequences.[67] As APCC points out, the arguments and data we initially examined were relevant to such complex proposals but not to a more limited array of services.[68] We therefore find that our concerns about requiring blocking and screening services can be satisfied by limiting the scope of the mandatory services and by requiring services that, in certain jurisdictions, have already been implemented and are otherwise feasible. The record shows, for example, that LECs have implemented screening services on a wide basis.[69] Further, blocking services limited to international calls have been economically implemented in several local exchange areas.[70] The fact that these services are already available in some areas indicates that costs of implementation and uncertainties about demand are not major obstacles to their effective deployment. Hence, we order the LECs to offer, at a minimum, the limited blocking and screening services described herein. The availability of blocking and screening services will ensure that aggregators can provide consumers with complete access to all OSPs without increasing their exposure to fraudulent calling.

19. *Domestic blocking services.* Instead of requiring a combined domestic/international blocking feature such as AT&T's "split 1+," APCC and NATA propose that we require LECs to offer separate, more flexible domestic and international blocking services. Under this proposal, one service would block domestic direct-dialed sequences (1+ and 10XXX-1+), and another service would block interna-

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[55] *Id.* at 12.

[56] Petition of NATA at 1, 4.

[57] *Id.* at 3-4. APCC and NATA also suggest that aggregators who subscribe to LEC blocking and screening services be relieved of liability for fraudulent 10XXX calls. Petition of APCC at 16; Petition of NATA at 5. We will discuss this issue in section 3, *infra*.

[58] Opposition of Southwestern Bell at 2.

[59] Opposition of Ameritech at 2-3.

[60] *Id.* at 3-4.

[61] Opposition of BellSouth at 2.

[62] *Id.* at 2-3.

[63] Opposition of NYNEX at 2-3 (no new evidence cited by petitioners).

[64] Opposition of United Telecommunications at 3.

[65] *See* Comments of the University of Wyoming at 3; Comments of Southern Telecommunications Consultants at 1-2 (10XXX unblocking should not be required until screening codes are observed by all OSPs); Comments of International Telecharge, Inc. (ITI) at 3; Reply of the Georgia Dep't of Administrative Services at 3 (10XXX unblocking should not be required until LEC services are available). Intellicall, at 10-15, also supports mandatory LEC services. Although styled as "Comments," we will treat Intellicall's submission as a "Reply" because it was filed on October 22, 1991, which was after the October 21 deadline for filing oppositions but within the filing period for reply comments.

[66] Reply of APCC at 8-13.

[67] *See Report and Order*, 6 FCC Rcd at 4739 n.30, 4741 & n.58; *see also* 91-35 Reply Comments of AT&T at App. B., pp. 3-4 (description of combined domestic/international "split 1+" blocking feature); 91-35 Comments of Bell Atlantic at 2-3 (cost and timing for implementation of AT&T blocking feature); 91-35 Comments of BellSouth at 1-3 (same); 91-35 Comments of US West at 5 (cost to deploy "1+ split blocking").

[68] *See* Petition of APCC at 11.

[69] *See* Opposition of BellSouth at 2-3; Opposition of AT&T at 6 (wide availability of LEC blocking and screening services); Reply of Southwestern Bell at 2-3 (currently offers effective screening services).

[70] Petition of APCC at Exhibit 2 (international blocking implemented in Florida, Georgia, Maryland, and New York); *see also* 91-35 Reply Comments of AT&T at App. B, p. 2 (LECs currently have capability to block all international calls).

tional direct-dialed sequences (011+ and 10XXX-011+).[71] As contemplated by APCC and NATA, an aggregator could order these services either separately or together. We believe that equipment-based selective processing, which may be accomplished through the reprogramming of PBXs or payphones or through the addition of adjunct devices, should be able to control domestic direct-dialed sequences. The record shows that the number of digits in the domestic sequences appears to be within the data handling capacities of much aggregator equipment or the adjunct devices that may be employed by aggregators.[72] Because equipment-based selective processing may well be a desirable and practical option for many aggregators, significant questions still exist with regard to the demand for domestic blocking services provided at LEC central offices, which would duplicate the processing capabilities of much aggregator equipment. We therefore decline to require domestic blocking services at this time.[73]

20. *International blocking services.* We find it appropriate, however, to require LECs to offer discrete, limited services that block only international direct-dialed sequences (011+ and 10XXX-011+). International blocking may pose a problem for aggregator equipment in some cases because the international direct-dialed sequences, such as 10XXX-011+, include a zero, as do the domestic operator-assisted sequences, such 10XXX-0+, which must be unblocked under our rules. Because of this similarity, equipment-based blocking mechanisms would have to distinguish the digits beyond the zero, which may exceed the data handling capacities of some aggregator equipment. Such limitations may make LEC international blocking services not only desirable to some aggregators, but essential. Moreover, fraudulent international calling appears to be a problem of greater magnitude than fraudulent domestic calling.[74] Hence, the level of demand for such services is likely to justify their implementation. Further, as noted by APCC, these services already appear to have been economically implemented in many local exchange areas, where they are offered to subscribers at a rate of $1.00 to $4.00 per month.[75] Thus, judging from the record, neither cost nor demand appears to pose significant problems for implementing international blocking services, especially because such services will not have to be coupled with domestic blocking services. For the foregoing reasons, we direct local exchange carriers to offer in locations where technically feasible, within six months, tariffed services that will block direct-dialed international calls.[76] Because these services will be limited to international blocking, which the record shows to be feasible, if not already implemented, in many local exchange areas, we do not think it will be burdensome or prohibitively expensive to implement such services within the six-month period we have prescribed.[77]

21. *Screening services.* NATA has also requested that we require the LECs to offer screening services.[78] These services, such as originating line screening and billed number screening, would inform OSPs of any restrictions associated with the line to which a caller is attempting to bill a call. According to NATA, a caller can dial a 10XXX-0- sequence, wait for a live operator, and then ask that the call be billed to the originating line, which may not be a valid billing option for a caller at an aggregator phone.[79] Without the availability of screening services, the OSP may have no way of determining what billing restrictions apply to that line. This situation could result in aggregators being fraudulently billed in some cases and in consumers being improperly denied access in other cases in which they do have proper billing authorization. We believe that originating line screening and billed number screening could prevent this scenario from occurring. As we have already noted, many of our earlier concerns about requiring LEC services, as well as the parties' arguments and data, were directed at proposals for an interrelated menu of blocking services. Upon further consideration of this issue, we conclude that requiring very specific screening services would not raise concerns about excessive cost or lack of demand. Screening services have, according to the record, been widely offered by LECs,[80] thus indicating that cost and subscriber demand have favored the implementation of such services. Given that these services may provide a useful fraud control mechanism without posing problems associated with cost and demand, we direct local exchange carriers to offer in locations where technically feasible, within six months, tariffed originating line and billed number screening services that indicate to operator service providers any billing restrictions on lines to which a caller may seek to bill a call. Because LECs already have extensive experience with these types of central office screening,[81] we find the six-month implementation period to be adequate.

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[71] Petition of APCC at 10-11; Petition of NATA at 4.

[72] *See Report and Order*, 6 FCC Rcd at 4740, 4742-43.

[73] The record shows that international toll fraud seems to be by far the major source of fraud for unblocked equipment. The measures we adopt today should allow aggregators to protect themselves against such fraud. We will, however, continue to monitor fraud involving domestic calls. If domestic fraud resulting from 10XXX unblocking becomes a greater problem in the future, we would consider taking further steps to help aggregators protect themselves against such fraud.

[74] *See id.* at 4740 n.44 (citing record evidence of 10XXX fraud, much of which involves international calls); *see also* 90-313 Comments of APCC at 64 (major source of payphone fraud is direct-dialed international calls). Relevant comments filed in CC Docket No. 90-313 were included in the record of this proceeding. *Report and Order*, 6 FCC Rcd at 4737 n.10.

[75] Petition of APCC at 11; 90-313 Comments of APCC at 64-66 (tariffed international blocking services in Florida, Georgia, and Maryland cost subscribers $1.00 to $4.00 per month).

[76] LECs shall file tariffs for these services with this Commission.

[77] We decline, however, to require the LECs to offer a "PIC-none" option, *see* note 53, *supra*, which is apparently already available in some areas. As noted by APCC, *see* Petition of APCC at 13-14, the record in this proceeding contains virtually no discussion of PIC-none. Because of this insufficiency in the record, we cannot require this option.

[78] *See* Petition of NATA at 2, 3-5; *see also Ex Parte* Presentation of Intellicall, dated January 10, 1992, at App. A, pp. 1-2; App. D, p. 5.

[79] Petition of NATA at 4.

[80] *See* Opposition of BellSouth at 2-3; Opposition of AT&T at 6 (wide availability of LEC screening services); Reply of Southwestern Bell at 2-3 (currently offers effective screening services).

[81] *Report and Order*, 6 FCC Rcd at 4741 n. 58.

22. *Deferral of unblocking pending implementation.* In addition, NATA has requested that we defer any required unblocking of 10XXX dialing until adequate LEC services are in place.[82] NATA argues that because such services are essential to the prevention of fraudulent 10XXX calling, their implementation must be a precondition to any unblocking requirement. As already discussed, we agree that LEC services may play an important role in preventing toll fraud associated with the use of 10XXX dialing sequences. Because the toll fraud problems that can be prevented with the mandatory blocking and screening services may not be susceptible to control through other means available to aggregators, we find that we must defer the unblocking deadlines imposed by Sections 64.704(c)(1), (2), and (3) of our rules,[83] which fall within the six-month deployment period for the LEC services. In the absence of such a deferral, aggregators could be exposed unduly to certain types of toll fraud while the mandatory LEC services are being implemented. Hence, we view this deferral, like our requirement that LEC services be offered, as part of our statutory duty to require "such actions or measures as are necessary to ensure that aggregators are not exposed to undue risk of fraud."[84]

23. Because we believe it necessary that aggregators be able to take full advantage of the fraud prevention capabilities of the LEC services we are requiring, we will make the unblocking schedule dependent upon the actual implementation date of the mandatory LEC services. If the mandatory LEC services are now available, aggregators subject to Sections 64.704(c)(1), (2), and (3) shall be required to unblock 10XXX dialing sequences within thirty days of the release of this Order. We believe this thirty-day period sufficient because aggregators will already have had six months since our rules became effective to plan for unblocking. If the mandatory LEC services are not now available but become available before the six-month deadline for their deployment, aggregators subject to Sections 64.704(c)(1), (2), and (3) shall be required to unblock within thirty days of the deployment of the services. In all other cases, aggregators subject to Sections 64.704(c)(1), (2), and (3) shall unblock 10XXX dialing sequences no later than six months from the release of this Order, by which time all mandatory LEC services must be deployed.

3. Relief from liability for fraudulent 10XXX calls.

24. *Petitions and comments.* APCC and NATA also seek reconsideration of our decision not to address the issue of whether aggregators who subscribe to LEC blocking or screening services should be relieved of liability for fraudulent 10XXX calls.[85] In the *Report and Order*, we said that these issues were not properly before us in this proceeding.[86] APCC and NATA disagree, arguing that considering relief from toll fraud liability is appropriate under the Section 226(g) requirement that we take steps to ensure that aggregators are not exposed to undue risk of fraud. APCC asserts that "relief from liability for fraud incurred by the failure of a screening or blocking service, after the [aggregator phone] is unblocked pursuant to a Commission rule, can reduce the undue exposure to fraud and is properly before the Commission in proceedings involving the unblocking of 10XXX."[87]

25. Several parties oppose the APCC and NATA arguments. The LEC commenters generally contend that LECs should not be responsible for the costs of 10XXX fraud and that such "indemnification" is not a solution to fraud but, instead, simply a mechanism for shifting the financial burden.[88] NYNEX further argues that Section 226(g) only requires the Commission to address exposure to fraud, not liability issues.[89] United Telecommunications maintains that resolution of the suggested liability issues would require a tariff investigation, which is outside the scope of this proceeding, and that liability gives aggregators an incentive to combat fraud.[90] MCI also opposes relieving aggregators of liability for fraudulent calls. MCI states that aggregators are liable to OSPs for such calls even if LEC blocking or screening services should have prevented the calls and that any recourse for these charges is not through the OSP but through the LEC from which the blocking and screening services were purchased.[91]

26. In reply, APCC argues that the Act requires us to consider *all* potential solutions to fraud.[92] APCC notes that it is not suggesting a shifting of the entire fraud control burden, since aggregators will have to subscribe to LEC services before liability is relieved.[93] The United States Telephone Association, however, contends that the Act does not authorize a shifting of liability: such an action would simply be a transfer of the problem, not a solution to fraud.[94]

27. *Decision.* To answer the question of whether relief from toll fraud liability is properly before us in this proceeding, we must determine if such an action would "ensure that aggregators are not exposed to undue risk of fraud."[95] We believe that the actions we have taken today should ensure that aggregators are able to protect against exposure to undue risk of fraud when they unblock their equipment. The issue of which party should be held liable for costs associated with any fraud that does occur, however, is beyond the scope of this proceeding. We think that the determinative statutory provision raised by APCC and NATA, Section 226(g), refers to actions that would prevent fraud from occurring in the first place, such as selective processing of 10XXX dialing sequences. Further, as United

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[82] Petition of NATA at 1, 4.

[83] *See* 47 C.F.R. § 64.704(c)(1)-(3) (unblocking within six months of effective date of rules for payphones and for aggregator equipment that currently has selective 10XXX capabilities; unblocking immediately upon installation for aggregator equipment manufactured or imported on or after April 17, 1992). The original deadline for compliance with subsections (1) and (2) was March 16, 1992.

[84] 47 U.S.C. § 226(g).

[85] Petition of APCC at 14-16; Petition of NATA at 4-5.

[86] *Report and Order*, 6 FCC Rcd at 4744-45.

[87] Petition of APCC at 15.

[88] Opposition of Southwestern Bell at 3; Opposition of Ameritech at 5-6 (shifting liability would result in inappropriate subsidy to the "cost causer"); Opposition of BellSouth at 3; Opposition of NYNEX at 3; Opposition of United Telecommunications at 4.

[89] Opposition of NYNEX at 3.

[90] Opposition of United Telecommunications at 4-5.

[91] Opposition of MCI at 6.

[92] Reply of APCC at 13.

[93] *Id.* at 14.

[94] Reply of the United States Telephone Association (USTA) at 2-3.

[95] 47 U.S.C. § 226(g).

Telecommunications points out, we may be required to examine relevant tariff provisions in order to resolve liability issues. Hence, any question of toll fraud liability would be more appropriately addressed in a Section 208 complaint proceeding, in response to a petition for declaratory ruling, or in a more general proceeding focused on toll fraud liability issues.[96]

4. Payphone unblocking schedule.

28. *Petition and comments.* APCC asks us to reconsider our 10XXX unblocking schedule for payphones.[97] In the *Report and Order,* we determined that all payphones should be unblocked within a single six-month period, rather than within the potentially longer, phased time periods applicable to other aggregators, because payphone owners, unlike other aggregators, "are primarily engaged in the business of providing telephone service."[98] We said that this status gave payphone owners a greater competitive incentive to upgrade their equipment more frequently and that the record indicated a shorter life for payphones than for other aggregator equipment. APCC asserts that no reasonable basis exists for treating payphone owners differently from other aggregators. According to APCC, payphone owners are potentially being required to spend more on unblocking than other aggregators,[99] and, yet, non-payphone aggregators are being allowed more time to unblock. APCC further contends that the differing capabilities of payphones should be taken into account in prescribing an unblocking schedule.[100] APCC also notes that many payphones are actually owned by premises owners who are engaged primarily in another business and that payphone owners do not replace their phones with each new generation of equipment but may use their current equipment for longer periods.[101]

29. AT&T argues that we should reject APCC's contentions and retain our original single unblocking schedule for all payphones.[102] AT&T agrees that payphone owners are different from other aggregators in that they provide telephone service as "a distinct and separate business." AT&T further asserts that payphones have different technical capabilities and useful lives than other aggregator equipment. United Telecommunications also supports our original conclusions.[103] ITI, however, agrees with APCC that all aggregators should be on the same phased unblocking schedule because all aggregators face similar burdens.[104] In its reply, APCC repeats its original contentions.[105]

30. *Decision.* We decline to revise our original determination that all payphones should be subject to a single unblocking schedule rather than the phased unblocking periods applicable to other aggregators.[106] APCC has offered no new or persuasive evidence to support its contention that "many" payphone owners are not primarily engaged in the provision of telephone service. On the contrary, we think it logical to conclude that most payphone owners, unlike other aggregators, have invested in their telephone equipment primarily to provide a source of revenue distinct from any other business in which they may be engaged. This being the case, these payphone owners will have an incentive to remain competitive by upgrading their equipment regularly, thus making modifications for 10XXX unblocking less burdensome. Further, while it is undoubtedly true that *some* payphone owners are primarily engaged in another business, it is not necessarily true that even these aggregators are earning insufficient revenue from their payphones to cover the costs of 10XXX unblocking. In addition, although we agree that the time between generations of equipment does not represent the useful life of the equipment, we view the relatively short time between generations of payphone equipment[107] as an indication that payphones will normally be replaced on a frequent basis. The record did not support a similar conclusion with regard to non-payphone aggregator equipment.

5. Proposed aggregator reports.

31. *Petition and comments.* AT&T asks that we revise our 10XXX unblocking rules to require aggregators to report to us on their unblocking plans.[108] AT&T states that the *Report and Order* "provides no guidance on what information aggregators must provide to the Commission to establish their compliance" with the 10XXX unblocking requirements.[109] Under AT&T's proposal, aggregators would be required to file a report indicating when they plan to unblock 10XXX access. An aggregator claiming to be in the 1997 unblocking category would also have to submit details about its location, equipment, LEC central office, and unblocking costs. AT&T sees these reports as a means to assist us in determining compliance with our rules, as well as a source of information for those in the telecommunications industry who might be affected by or involved with 10XXX unblocking.

32. Commenters opposed AT&T's request, stating that the reports are an unwarranted expense, burdensome to the Commission and to aggregators, inconsistent with the

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[96] The Commission is well aware of the liability disputes that arise from fraudulent calling and is committed to moving forward with consumer education efforts, *see* Public Notice, "Consumer Alert: Telecommunications Toll Fraud," DA 92-728 (released June 9, 1992), as well as with proceedings to establish, in a clear and fair manner, responsibility for losses incurred through fraudulent calling.

[97] Petition of APCC at 17-22.

[98] *Report and Order,* 6 FCC Rcd at 4741.

[99] Petition of APCC at 19 ($105.00 per payphone average cost, cited in *Report and Order,* is greater than the $15.00 per line threshold for other aggregators).

[100] *Id.* at 20.

[101] *Id.* at 21-22.

[102] Opposition of AT&T at 7.

[103] Opposition of United Telecommunications at 5-6.

[104] Comments of ITI at 2-3.

[105] Reply of APCC at 15 & n.17.

[106] The schedule for payphone unblocking shall, however, be deferred until the deployment of mandatory LEC services, as described in section 2, *supra.*

[107] *See Report and Order,* 6 FCC Rcd at 4741 n.61 (record shows two years between generations of payphones, on average). An APCC survey suggests that many payphones already have selective 10XXX capabilities: 81.5% of the surveyed payphones (32,801 of 40,233 have selective capabilities, i.e., can allow all 10XXX dialing sequences except 10XXX-1+ and 10XXX-011+. Petition of APCC at Exhibit 3.

[108] Petition of AT&T at 8-9.

[109] *Id.* at 8.

Paperwork Reduction Act, and might contain competitively sensitive information.[110] AT&T responded that the Commission has the authority to require such reports, which would facilitate our enforcement efforts.[111]

33. *Decision.* First, we wish to emphasize that, contrary to AT&T's contention, we have addressed this issue. In the *Report and Order*, we said that "[a]ggregators need not report to the Commission after making [their unblocking] determination but must simply unblock 10XXX access by the appropriate deadline."[112] Further, we reject AT&T's proposal because such reports would be an administrative burden to this Commission and a financial burden to aggregators, without any commensurate public benefit. There is no reason to conclude that in the absence of the proposed reports, our enforcement procedures will be unable to ensure compliance with the unblocking rules, which we plan to enforce vigorously.

6. Matters raised for clarification.

34. The parties have sought clarification of several matters, which we will address briefly. For the most part, there was little responsive comment on these issues.

35. First, ACE has asked whether, in calculating per line modification costs under our $15.00 per line cost threshold, lines to non-aggregator phones that are part of the same system should be included in the calculation.[113] We think that nonaggregator lines should be excluded from this calculation. Our rules concern only aggregator phones and, as such, non-aggregator lines are irrelevant to the required per line calculation.

36. Next, APCC asks whether in non-equal access areas of the country, where LEC switches cannot process 10XXX codes, aggregators must take steps to unblock 10XXX access.[114] Because 10XXX access simply cannot be used in such areas, we clarify our 10XXX unblocking rules to exempt aggregators in non-equal access areas on a temporary basis. Aggregators in those areas, however, shall be held responsible for monitoring any future conversion to equal access. Once aggregators are notified of such a conversion by their LEC, the generic time periods of our original unblocking schedule will begin to run, and aggregators shall be required to comply with the appropriate deadline as measured from the notification date.[115]

37. APCC has also asked us to clarify the standards that would apply to requests for waivers of the 10XXX unblocking rules.[116] APCC suggests that we grant an exemption to any aggregator who has received a waiver of comparable state regulations. We decline to clarify our waiver standards as requested by APCC. As we stated in the *Report and Order*, "the myriad types of aggregator equipment and the variable and numerous aggregator situations [pose] significant problems for the formulation of meaningful generalized waiver standards applicable to our 10XXX unblocking requirements."[117] We concluded that "the many permutations involving aggregators and their equipment" required us to consider waiver requests only on a case-by-case basis under the appropriate legal standards.[118] While the factors considered by a state commission could be presented to us as the basis for a waiver request, we will exercise our discretion independently in enforcing our rules, especially when our rules have a specific statutory basis.

38. Finally, APCC asks that we clarify our 10XXX unblocking rules to allow payphones that currently lack selective 10XXX capabilities to translate a 10XXX dialing sequence into the appropriate carrier's 800 or 950 access number.[119] Under APCC's proposal, when a caller dials a carrier's 10XXX code, the payphone would apparently be programmed to re-dial and outpulse that carrier's 800 or 950 number automatically. APCC suggests that this option would provide a way for payphone owners to allow "10XXX access at a reasonable cost." AT&T opposes APCC's proposal, arguing that there is no justification for allowing payphones to "unblock" by this translation process.[120] AT&T contends that callers using such a phone would be subjected to variations in service associated with 800 or 950, but not 10XXX, access and that any payphone that can perform this translation process would also have selective 10XXX capabilities. We reject APCC's proposal. As we have explained above and in the *Report and Order*, 10XXX access has advantages for the consumer that the consumer should, as a matter of individual judgment, be able to choose. Similarly, billing options may not be identical for all three access methods, and the consumer should be permitted to pursue the desired options associated with a particular access method. While we are not unmindful of the financial aspects of 10XXX unblocking cited by APCC, our primary concern in this proceeding is to enhance consumer choice.

B. 800 and 950 Access.

1. Whether 800 or 950 access must be established.

39. *Petition and comments.* AT&T argues that we should reconsider our decision to require all OSPs to establish an 800 or 950 access number.[121] AT&T characterizes 800 and 950 access as inefficient dialing protocols that some carriers have found unnecessary to establish and contends that establishment of such access would be prohibitively

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[110] Comments of Epic at 18; Opposition of the American Hotel and Motel Association (AHMA) at 4; Opposition of U.S. Long Distance (USLD) at 8-9; Opposition of the Joint Higher Education Parties at 6-7; Opposition of Capital Network System (CNS) at 8-9; Reply of Intellicall at 16.

[111] Reply of AT&T at 3-6.

[112] *Report and Order*, 6 FCC Rcd at 4743.

[113] Petition of ACE at 15. For example, a single private branch exchange ("PBX") could serve both aggregator phones, such as hotel room phones, and non-aggregator phones, such as those used only by hotel employees for business purposes.

[114] Petition of APCC at 23; *accord* Comments of Stenocall at 1; Comments of ITI at 3.

[115] For example, payphone aggregators will be required to unblock 10XXX access within six months of the date on which they are notified that their local exchange area is being converted to equal access.

[116] Petition of APCC at 24; *accord* Comments of ITI at 4.

[117] *Report and Order*, 6 FCC Rcd at 4745.

[118] Rules may be waived if there is "good cause" to do so. *See* 47 C.F.R. § 1.3. The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest. WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969); *see also* Northeast Cellular Tel. Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[119] Petition of APCC at 24.

[120] Opposition of AT&T at 8.

[121] Petition of AT&T at 2-6.

expensive and cause a degradation in service.[122] According to AT&T, the limited number of consumers who will not have 10XXX access as an available choice can be adequately served by "0- transfer" services offered by LECs.[123] In summary, AT&T asserts that carriers should be allowed to choose access methods based on their own marketing strategies and network architecture.[124]

40. Many commenters oppose AT&T's view on this issue and argue that 800 or 950 access will be necessary for those aggregator locations at which 10XXX unblocking has not taken place.[125] Some of these commenters suggest that under our schedule, a significant number of aggregators will not have to unblock 10XXX access until 1997. Several also note that AT&T has offered no new arguments or evidence regarding the costs of a new access method or the alleged service degradation associated with it. Further, CNS contends that effective marketing can limit the use of the new access method and that the costs of the new method will be offset by revenues from additional calls that would otherwise be blocked.[126] In addition, USLD, MCI, CNS, and CompTel challenge AT&T's argument that 0- transfer services can adequately serve consumers for whom 10XXX access is unavailable.[127] According to these commenters, such a transfer always involves a live operator, which is one of the alleged defects AT&T has identified with 800 or 950 access.[128] MCI also notes that 0- transfer services are not available everywhere.[129] In reply, AT&T maintains that no one has controverted the facts underlying its arguments on this issue.[130]

41. *Decision.* AT&T has offered no new arguments or evidence on this issue. We therefore decline to eliminate our requirement that all OSPs establish an 800 or 950 access number. Nothing offered on reconsideration undermines our original conclusion that

> the establishment of 800 or 950 access by all OSPs is necessary to provide an access method for consumers at aggregator locations where 10XXX access is temporarily unavailable during the six-year transition to full unblocking.... Moreover, the use of 10XXX access is not technically possible in non-equal access areas of the country. If we fail to provide a means of access for consumers in either situation, our policies would leave a significant number of consumers without access to all OSPs. This result would clearly be inconsistent with the considerations underlying the [Act].[131]

AT&T has presented no persuasive basis for its argument that only a limited number of consumers will find themselves in either of the situations just described, where 10XXX access is unavailable. Regardless of the number of such consumers, however, we do not view the proposed 0- transfer services as providing a broad solution to their access needs under the Act.[132] While such services may be useful in some situations, they do not appear to offer the potential for automated capabilities associated with the 800 and 950 access numbers currently offered by some OSPs. Further, we have already given full consideration to virtually identical arguments regarding the alleged costs and service degradation associated with the 800 and 950 access methods.[133] Even if we were to assume the accuracy of AT&T's predicted implementation and operating costs for its new 800 access method, we think it likely that these costs will be recovered. The costs will, at least in part, be offset by the revenues derived from calls that would be blocked in the absence of such access. In addition, costs can be recovered from rates or charges gauged to the cost of providing the new access method. If this new access method actually proves to be more costly to operate, AT&T can more vigorously market 10XXX access where it is available.[134]

2. The scope of 800 or 950 access.

42. *Petition and comments.* In the alternative, AT&T argues that if we retain the 800/950 requirement, we should "delineate specifically what operator services must be offered through this form of access."[135] According to AT&T, an OSP may, for example, use an 800 number for its proprietary calling card but not for other billing options, such as collect calls, which are available via other access methods. AT&T contends that callers will be con-

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[122] *Id.* at 2-3, 5 (AT&T asserts that a live operator and increased handling time would be necessary for 800 access; $75 million development cost, up to $250 million in annual operational expenses).

[123] *Id.* at 2, 4. A "0-" call occurs when the customer dials only the "0" digit and then waits for assistance from the LEC operator. With a "0-" transfer service, the LEC operator would transfer the "0-" call to the consumer's requested OSP. OSPs wishing to receive such transferred calls would usually have to subscribe to the LEC service. *See Report and Order,* 6 FCC Rcd at 4744 n. 113.

[124] Petition of AT&T at 6.

[125] Opposition of AHMA at 3-6; Opposition of USLD at 5; Opposition of MCI at 2-3; Opposition of United Telecommunications at 7-8; Opposition of the Joint Higher Education Parties at 5; Opposition of CNS at 3; Opposition of the Competitive Telecommunications Association (CompTel) at 5; Comments of ITI at 5-6.

[126] Opposition of CNS at 4-5.

[127] Opposition of USLD at 3-4; Opposition of MCI at 3; Opposition of CNS at 7; Opposition of CompTel at 3-5.

[128] Southwestern Bell, however, disputes USLD's assertion that 0- transfer services are confusing to the consumer. Reply of Southwestern Bell at 5-6.

[129] Opposition of MCI at 3.

[130] Reply of AT&T at 3.

[131] *Report and Order,* 6 FCC Rcd at 4744.

[132] *See* 47 U.S.C. § 226(e)(1) (only 10XXX, 800, and 950 access methods are listed as potential solutions).

[133] *See Report and Order,* 6 FCC Rcd at 4744.

[134] It has come to our attention that AT&T has offered 800 access to its operator services through its general customer service 800 number, which contains a menu of other options in addition to a lengthy explanation of the operator service option. When we adopted Section 64.704(d), we intended that each OSP implement an 800 or 950 access number that would serve consumers efficiently and promptly. We are monitoring AT&T's 800 access method, as well as other 800 and 950 access numbers, to ensure that consumers are being served as we intended. *See* Policies and Rules Concerning Operator Service Providers, CC Docket No. 90-313, Phase II: Order, DA 92-722, paras. 3-4 (Com. Car. Bur. released June 5, 1992) (requiring certain OSPs to file, *inter alia,* information regarding 800 and 950 access methods). In any case in which they are not, we shall consider whether to take further action to require changes in access methods.

[135] Petition of AT&T at 7.

fused if all billing options are not offered through each OSP's 800 or 950 number. AT&T proposes that to minimize customer confusion, all OSPs should be required to offer "all of their operator-assisted and operator-handled services to customers without regard to the form of access used by the end user to reach that OSP."[136]

43. All comments on this proposal were negative. MCI contends that the Act requires only that *access*, not certain billing options, be offered through 800 or 950 numbers.[137] MCI and ITI both maintain that OSPs should determine which billing options are offered through particular access methods.[138] CNS and USLD assert that it is inconsistent for AT&T to argue that we should not "dictate" the carriers' access methods but should define the services to be offered through 800 or 950 access.[139] United Telecommunications argues that AT&T's proposal is beyond the scope of this proceeding and that the record does not show that such a requirement is necessary for the benefit of consumers.[140] In reply, AT&T states that the proposed requirement is necessary to prevent OSPs from narrowly restricting the services offered via their access methods.[141]

44. *Decision.* We conclude that AT&T's proposal is beyond the scope of this proceeding. The purpose of this rule making proceeding was to carry out the requirements of Section 226(e) of the Act. Nothing in that section or its legislative history suggests that we should go beyond consideration of the access *methods* that are necessary.

3. Store-and-forward operator service providers.

45. *Petition and comments.* APCC has filed a petition for waiver of our 800/950 number requirement for OSPs that provide operator services via "store-and-forward" (S&F) devices located within payphones.[142] S&F devices perform operator assistance functions, such as the collection of billing information, inside the payphone itself, without the involvement of centralized operator service facilities at a different location.[143] Because our 800/950 number requirement, 47 C.F.R. § 64.704(d), applies to "all providers of operator services," this rule would require S&F OSPs as well as facility-based OSPs to establish 800 or 950 access. APCC maintains that the purpose of the 800/950 requirement is to ensure that OSPs can be reached by their subscribers from any location. According to APCC, however, S&F devices are not equipped to handle calls originating outside the payphone where the device is installed. Further, consumers who use these services do not have pre-established accounts with such OSPs. These services are not represented to be available anywhere other than at the location of the payphone and do not employ access methods such as 10XXX. Hence, because S&F OSPs have no subscribers and are not intended to be used from other locations, APCC sees no legitimate reason for applying the 800/950 requirement to them. MCI opposes granting a blanket waiver for S&F OSPs, arguing that waivers should be granted only on an individual basis.[144] USTA maintains that waiver of this requirement would limit the ability of consumers to reach their carriers of choice.[145] In reply, APCC contends that MCI has failed to offer persuasive arguments against a collective waiver and that consumer access to other OSPs would be unaffected by the requested waiver.[146]

46. *Decision.* Although APCC has styled its request as a petition for waiver, we believe it is more appropriate to address this issue in the context of the current rule making proceeding. Accordingly, we will reconsider the application of our 800/950 requirement to S&F OSPs on our own motion.[147] In the *Report and Order*, we agreed "in principle that [S&F] OSPs should not have to establish 800 or 950 access."[148] But we said that it would be more appropriate to consider waiver requests so that we could examine the individual circumstances of all S&F OSPs, such as hotels that employ this technology through their PBXs, and not simply payphones. Upon reconsideration, however, we now conclude that this issue can be addressed most efficiently in a collective rather than individual context. The description contained in APCC's petition indicates that S&F OSPs form a discrete category among those entities providing operator services and can effectively be distinguished from those facility-based OSPs that offer service to callers not located on their premises. We therefore apply conclusively our original opinion that S&F OSPs who offer operator services only where their S&F devices are physically located should not be required to establish 800 or 950 access numbers. We have revised the text of Section 64.704(d) as set out in Appendix B.[149] In keeping with our earlier concerns, however, we emphasize that facility-based OSPs who provide operator services for callers who are not on their premises shall remain subject to Section 64.704(d).[150] Further, all OSPs, including those employing S&F technology, must comply with all other applicable requirements imposed by our rules.

C. Compensation for "Subscriber 800" Calls.

47. *Petition and comments.* Finally, APCC asks us to reconsider our determination that so-called "subscriber 800" calls are outside of the scope of the compensation scheme being considered in this proceeding.[151] In the initial stages of this proceeding, APCC argued that all calls initiated via an 800 number should be compensable under any compensation plan we might adopt, including calls

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[136] *Id.*
[137] Opposition of MCI at 4-5.
[138] *Id.* at 5; Comments of ITI at 8.
[139] Opposition of CNS at 6-7; Opposition of USLD at 6.
[140] Opposition of United Telecommunications at 8 n.3.
[141] Reply of AT&T at 4.
[142] Petition for Waiver, filed by APCC on January 31, 1992. In addition, Advanced Payphone Systems, Inc., Comtel Computer Corporation, Indiana Telcom Corporation, MIS Associates, Inc., and Public Communications Associates Ltd. have filed similar waiver requests.
[143] APCC Petition for Waiver at 3.
[144] MCI Opposition to APCC Petition for Waiver at 1-2.
[145] USTA Pleading on Petition for Waiver at 2.
[146] APCC Reply at 1-2.
[147] Hence, we dismiss as moot APCC's petition, as well as other petitions that request such waivers.
[148] *Report and Order*, 6 FCC Rcd at 4744.
[149] For OSPs who do not employ S&F technology, however, we did not revise the deadline for compliance with this rule. Compliance was required no later than six months from the original effective date of the rule.
[150] As APCC has noted, consumer access to non-S&F OSPs will be unaffected by our ruling.
[151] Petition of APCC at 1-7.

that go directly to a subscriber that is not an OSP.[152] We disagreed, citing the legislative history that specified that we should "consider the need to prescribe compensation for independent payphone owners for calls made *using a carrier-specific access code.*"[153] We said that an 800 call directly to a subscriber did not involve a "carrier-specific access code." We determined that the 800 number in question is that of the end user or subscriber and not a carrier, and that such a call did not involve an "access code," as defined by the Act and our rules.[154] APCC now argues that we should reconsider these findings. According to APCC, a subscriber 800 number is associated with a particular OSP and is routed to that OSP; hence, the call involves a carrier-specific access code. Further, APCC maintains that the exclusion of such calls from the compensation scheme is inconsistent with our policies because the same equity considerations underlying our overall compensation decision applies to these calls.[155] APCC also contends that exclusion of these calls from the compensation mechanism burdens other callers with higher maintenance costs, in violation of our policy that interstate costs of payphone service should not be recovered from only a portion of the users.[156] APCC says that subscriber 800 numbers are widely used at payphones and that a failure to prescribe compensation for such calls will be a severe economic burden to payphone owners.[157] APCC argues that we have incorrectly assumed that callers using these numbers are not exercising a right of choice among OSPs.[158]

48. In response, the California Payphone Association agrees with APCC, asserting that OSPs handling subscriber 800 calls should contribute to the maintenance of the payphones at which the calls originate.[159] MCI, however, contends that such compensation would be inconsistent with the Act because the calls in question do not utilize operator assistance or "operator services" as defined by the Act.[160] AT&T and United Telecommunications also oppose APCC, arguing that the Act's compensation provision did not concern non-operator service calls.[161]

49. In reply, APCC contends that none of the conventional access code calls involve "operator services" as defined by the Act because the statutory definition of that term explicitly excludes access code calls.[162] Further, the Act does not require compensation to apply only to "operator service" calls, but to "any call routed to a non-presubscribed OSP."[163] APCC asserts that subscriber 800 calls have a purpose similar to that of conventional access code calls: to invoke an alternative means of billing and completion that does not involve the presubscribed OSP.[164]

50. *Decision.* Because of the clear legislative history underlying the statutory compensation provision, we decline to revise our earlier determination. APCC fails to reconcile its arguments with the explicit statement of congressional intent that prescribed compensation should concern only those calls "made using a carrier-specific access code." Under the Act and our rules, an "access code" is a "sequence of numbers that, when dialed, connect the caller to the provider of operator services associated with that sequence."[165] A subscriber 800 number does not connect the caller with an OSP. Instead, it connects the caller directly to the called subscriber.[166] Given this obvious inconsistency with the legislative history of the Act's compensation provision, we cannot find that subscriber 800 calls fall within the scope of any compensation scheme that we may prescribe under the Act.

IV. CONCLUSION

51. In this Order, we have declined to reconsider our rules under which aggregators must, according to a specified schedule, allow 10XXX access to operator service providers. Some aspects of these rules have been clarified herein. To ensure that aggregators are not exposed to undue risk of fraud associated with 10XXX access, we have reconsidered our earlier decision regarding LEC blocking and screening services and have decided to require LECs to offer specified services within six months. We have deferred certain unblocking deadlines pending deployment of these services. We have also declined to reconsider our original determination regarding mandatory 800 or 950 access numbers for all OSPs, except that we have exempted store-and-forward OSPs from this requirement. Finally, we have reaffirmed our initial decision regarding compensation for subscriber 800 calls.

V. ORDERING CLAUSES

52. Accordingly, IT IS ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 226 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 226, that the petitions for reconsideration, partial reconsideration, and/or clarification filed in this proceeding ARE DENIED, except as provided herein.

53. IT IS FURTHER ORDERED, pursuant to Sections 1, 4(i), 4(j), 201-205, and 226, of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 154(i), 154(j), 201-205, 226, that Part 64 of the Commission's rules, 47 C.F.R. Part 64, IS AMENDED as set forth in Appendix B below, effective 30 days after publication in the Federal Register.

54. IT IS FURTHER ORDERED that the stay imposed in *Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, CC Docket No. 91-35: Order, 7 FCC Rcd 2146 (1992), is lifted effective six months from the release of this Order on Reconsideration, subject to the unblocking schedule set forth in paragraph 23, *supra*.

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[152] *See Report and Order*, 6 FCC Rcd at 4746.
[153] *Id.* (quoting the Senate committee report on the Act) (emphasis added).
[154] *Id.*
[155] Petition of APCC at 3-4.
[156] *Id.*
[157] *Id.* at 4-5.
[158] *Id.* at 5.
[159] Comments of the California Payphone Association at 1-3.
[160] Opposition of MCI at 5-6.
[161] Opposition of AT&T at 9; Opposition of United Telecommunications at 6.
[162] Reply of APCC at 4.
[163] *Id.* at 4-5.
[164] *Id.* at 5 n.2.
[165] 47 U.S.C. § 226(a)(1); 47 C.F.R. § 64.708(a).
[166] Hence, the caller cannot choose among the available OSPs but must instead use whichever OSP the subscriber has chosen.

55. IT IS FURTHER ORDERED that all local exchange carriers shall offer, in locations where technically feasible, within six months of the release of this Order, tariffed services that block international direct-dialed calls as described herein. Local exchange carriers shall file with this Commission tariffs for these services on statutory notice, to be effective no later than six months from the release of this Order.

56. IT IS FURTHER ORDERED that all local exchange carriers shall offer, in locations where technically feasible, within six months of the release of this Order, tariffed services that indicate to operator service providers any billing restrictions on lines to which a caller may seek to bill a call.

57. IT IS FURTHER ORDERED that the petitions for waiver of 47 C.F.R. § 64.704(d) filed by the American Public Communications Council, Advanced Payphone Systems, Inc., Comtel Computer Corporation, Indiana Telcom Corporation, MIS Associates, Inc., and Public Communications Associates Ltd. ARE DISMISSED.

58. IT IS FURTHER ORDERED that the Conditional Request for Permission to Exceed Page Limit filed by the American Public Communications Council on November 27, 1991, IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

Petitions

American Council on Education and the National Association of College and University Business Officers (ACE)

American Public Communications Council (APCC)

American Telephone and Telegraph Co. (AT&T)

Association of College and University Telecommunications Administrators (ACUTA)

North American Telecommunications Association (NATA)

Oppositions and Comments

American Hotel and Motel Association (AHMA)

AT&T

Ameritech Operating Companies

BellSouth Telephone Companies

California Payphone Association

Capital Network System (CNS)

Competitive Telecommunications Association (CompTel)

Epic Healthcare Group (Epic)

International Telecharge, Inc. (ITI)

Joint Higher Education Parties

MCI Telecommunications Corp.

New York Telephone Co. and New England Telephone and Telegraph Co. (NYNEX)

Southern Telecommunications Consultants

Southwestern Bell Telephone Co.

Stenocall

United States Long Distance Corp. (USLD)

United Telecommunications

University of Wyoming

Reply Comments

APCC
AT&T
Ameritech Operating Companies
Georgia Department of Administrative Services
Intellicall
Joint Higher Education Parties
Southwestern Bell Telephone Co.
United States Telephone Association (USTA)

APPENDIX B

RULES

Part 64 of Title 47 of the Code of Federal Regulations is amended as follows:

1. The authority citation for Part 64 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended, 47 U.S.C. § 154, unless otherwise noted. Interpret or apply secs. 201, 218, 226, 48 Stat. 1070, as amended, 1077, 47 U.S.C. §§ 201, 218, 226, unless otherwise noted.

2. Section 64.704 is amended by revising paragraphs (c)(6) and (d) to read as follows:

§ 64.704 Call blocking prohibited.

*****

(c) ***

(6) This paragraph does not apply to the use by consumers of equal access code dialing sequences that result in billing to the originating telephone.

(d) All providers of operator services, except those employing a store-and-forward device that serves only consumers at the location of the device, shall establish an "800" or "950" access code number within six (6) months of the effective date of this paragraph.

STATEMENT OF
COMMISSIONER SHERRIE P. MARSHALL

Re: Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation, CC Docket No. 91-35, Order on Reconsideration

Fraudulent calling, be it over private branch exchanges (PBX), via calling cards or through manipulation of public payphones, leads to millions of dollars of business losses per year. Today's decision attempts to mitigate against such losses by establishing a sufficiently long phase-in period for aggregators to purchase equipment that permits the unblocking of 10XXX calling *and* is capable of detecting fraudulent calling. The additional requirement that local exchange carriers offer call aggregators certain blocking and screening services further limits the potential for 10XXX fraud.

Nevertheless, I remain troubled by the steady rise in business losses due to fraudulent calling. Further, I am particularly concerned that the continuing dispute between phone equipment users and phone network service providers (both local and interstate carriers) over liability for fraudulent calls has yet to be resolved. This dispute may be deterring important network investment by the local and long distance service providers as well as harming the individual businesses victimized by fraudulent calling schemes.

The FCC must move quickly to ensure the crafting of a solution that fairly apportions liability between network providers and users when fraudulent calls occur. I intend to work closely with the other Commissioners to expeditiously address this problem and I support Commissioner Duggan's proposal to commence an *en banc* proceeding to explore proposed solutions.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs	AAD 90-22

ORDER

Adopted: July 2, 1992; Released: July 10, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On November 4, 1991, Southwestern Bell Telephone Company (SWB) petitioned for reconsideration of an order in the above-captioned proceeding requiring the United Telephone System Companies (United) to include in the affiliate transaction section of their Cost Allocation Manual (CAM) a nonregulated service provided by the United companies to their affiliate US Sprint.[1] We deny SWB's petition.[2]

2. On September 6, 1991, the Common Carrier Bureau (Bureau) released a Memorandum Opinion and Order[3] resolving issues that MCI Telecommunications Corporation (MCI) had raised in its comments on certain revisions to United's CAM.[4] MCI had argued that United should list in the affiliate transaction section of its CAM a marketing service that it provides to US Sprint. United responded that this was not required because the marketing service is nonregulated and provided under a sales agency agreement. In the *United CAM Order* we rejected MCI's argument. However, on our own motion, we reconsidered this conclusion, and in the *Order on Reconsideration* we determined that all affiliate transactions of the telephone company, whether regulated or nonregulated, must be listed in its CAM.

II. SWB PETITION

3. SWB alleges that in the *Order on Reconsideration* the Bureau changed the rules governing identification of affiliate transactions without following rulemaking procedures. SWB argues that if the Bureau intended to make a finding that would change the existing rules, it should have given notice to all persons subject to the rule and provided all interested parties an opportunity to participate in the proceeding.[5]

4. SWB also alleges that the *Order on Reconsideration* is inconsistent with the *Joint Cost Order*.[6] SWB asserts that in the *Joint Cost Order* the Commission stated that the pricing of individual nonregulated products and services does not fall within the Commission's statutory mandate.[7] SWB states that the Commission's goal in establishing standards for affiliate transactions is to prevent cost shifting to ratepayers by means of improper transfer pricing. SWB argues that the risk of cost shifting to ratepayers is nonexistent when the local exchange carrier offers a nonregulated service to a nonregulated affiliate. SWB believes that the Commission's affiliate transaction rules[8] do not require local exchange carriers (LECs) to list these services as affiliate transactions. SWB claims that the Commission's affiliate transaction rules only govern transfers to or from the regulated carrier which are recorded in the regulated accounts.[9] SWB also believes that the affiliate transaction rules do not apply to nonregulated services that the LECs provide to their nonregulated affiliates.

5. Finally, SWB argues that including these transactions in the Affiliate Transaction Tables of the ARMIS[10] FCC Report 43-02[11] is inconsistent with the *Joint Cost Order*. SWB believes that it should not be required to provide the terms and conditions of sale for competitive, nonregulated products or service offerings.[12]

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[1] United Telephone System Companies' Permanent Cost Allocation Manuals for the Separation of Regulated and Nonregulated Costs, 6 FCC Rcd 5812 (1991), (*Order on Reconsideration)*

[2] The following parties filed comments: Pacific Bell and Nevada Bell (The Pacific Companies); the United Telephone System Companies (United); US West Communications, Inc. (US West); the United States Telephone Association (USTA); and the Tennessee Public Service Commission (Tennessee). BellSouth Corporation (BellSouth), SWB and United filed replies.

[3] United Telephone System Companies' Permanent Cost Allocation Manuals for Separation of Regulated and Nonregulated Costs, 6 FCC Rcd 52335 (1991) (*United CAM Order).*

[4] United filed these revisions on October 31, 1990. The revisions were designed to consolidate United's separate CAMs into one manual and made various other changes.

[5] SWB petition, pp. 3-4.

[6] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd 1298 (*Joint Cost Order), recon.*, 2 FCC Rcd 62383 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd sub nom.* Southwestern Bell Corp. v. FCC, 896 F. 2d 1378 (D.C. Cir. 1990).

[7] *See Joint Cost Order*, 2 FCC Rcd 1298, para. 40.

[8] 47 C.F.R. §32.27.

[9] SWB Petition at 4-5.

[10] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 32, 43, 67, and 69 of the FCC's Rules), 2 FCC Rcd 5770 (1987) (*ARMIS Order), recon.*, 3 FCC Rcd 6375 (1988).

[11] On January 31, 1992, the Bureau released an Order incorporating two affiliate transaction tables into the ARMIS FCC Report 43-02. These tables are: Table V - Analysis of Assets Purchased From or Sold To Affiliates and Table VI - Analysis of Services Purchases From or Sold To Affiliates. These tables require LECs to list the dollar amounts of affiliate transactions and categorize these amounts as fully distributed, prevailing market price and tariff rate. The reported amounts are aggregated at the affiliate company level. *See* Revision of ARMIS USOA Report (FCC Report 43-02) for Tier 1 Telephone Companies, 7 FCC Rcd 1083.

[12] SWB Petition at 6.

III. COMMENTS

6. United claims that SWB misunderstands the intent of the *Order on Reconsideration*, which it believes merely requires a narrative listing in the CAM of nonregulated transactions with nonregulated affiliates.[13] United says that it will support the petition if SWB is correct in believing that the *Order on Reconsideration* imposes the Commission's affiliate transaction rules and ARMIS reporting requirements on these affiliate transactions.[14]

7. USTA, U S West and the Pacific Companies support SWB's-petition. According to USTA, the CAMs should not include a list of specific affiliate transactions if the basis for cost allocation is included in the CAM.[15] U S West suggests that the LECs should only be required to include a narrative listing of these transactions in their CAMs. U S West also states that the LECs should include a statement in the introduction of the Affiliate Transactions section of their CAMs asserting that the fully distributed costs for the nonregulated services listed have been removed prior to the application of the jurisdictional separations rules[16] and that the amounts charged to the affiliates have no impact on interstate access revenues.[17]

8. The Pacific Companies assert that the *Order on Reconsideration* changed the meaning of § 32.27(c) of the Commission's Rules without proper rulemaking procedure. According to the Pacific Companies, the term "carrier" as used in the *Joint Cost Order* means the carrier's regulated telephone operations. The Pacific Companies argue that in the *Order on Reconsideration* the Bureau created ambiguity by combining both regulated telephone operations and nonregulated activities together in the term "carrier." The Pacific Companies conclude that because of this ambiguity the Commission's affiliate transactions rules can now be interpreted to require that exclusive nonregulated-to-nonregulated transactions must be recorded at fully distributed costs.[18]

9. Tennessee requests that we provide guidance on the application and enforcement of the Commission's rules relating to affiliate transactions between BellSouth and BellSouth Advertising & Publishing Company (BAPCO), the BellSouth nonregulated affiliate which produces yellow pages.[19]

IV. DISCUSSION

10. We affirm our conclusion that United Telephone is required to list as an affiliate transaction in its CAM the marketing service it provides to its affiliate US Sprint. At the time we issued the *United CAM Order* and the *Order on Reconsideration*, the contents of the CAM were governed by the language of paragraph 240 of the *Joint Cost Order*, which states that the CAM must include "a statement identifying affiliates that engage in or will engage in transactions with the carrier entity and describing the nature, terms, and frequency of such transactions."[20] The term "carrier entity" as used here refers to the accounting entity that provides regulated telephone service, and is synonymous with the term "company" as that term is defined and used in the Uniform System of Accounts.[21] This entity, the telephone company, may also provide nonregulated products or services. When the telephone company provides nonregulated products or services to its affiliates, those affiliates are plainly "engage[d] in transactions with the carrier entity." The resulting affiliate transactions must, therefore, be listed in the CAM.

11. Our interpretation of this aspect of the *Joint Cost Order* was confirmed by the Commission in its recent codification of the CAM requirements as §64.903 of the Rules.[22] New §64.903(a)(iv) states that the CAM shall contain "A statement identifying each affiliate that engages in or will engage in transactions with the carrier and describing the nature, terms, and frequency of each transaction." The term "carrier" is used throughout §64.903 to refer to the entire company, and not merely to the regulated activities of the company.[23] The plain meaning of the new rule is that *each* transaction between a carrier and an affiliate must be listed in the CAM; there is no exception for transactions involving the nonregulated activities of the carrier.

12. The requirement that affiliate transactions be listed and described in the CAM thus extends to transactions that are not affected by the affiliate transaction rules contained in §32.27. Likewise, and contrary to the apprehensions of several of the parties to the instant proceeding, requiring a carrier to list an affiliate transaction in the CAM does not make that transaction subject to §32.27. Section 32.27 affects only transactions that are recorded in regulated accounts. When a carrier provides a nonregulated service to its affiliate and records the transaction in a nonregulated revenue account, §32.27 does not apply.

13. United suggests that affiliate transactions involving the nonregulated products and services of a carrier should be listed in the CAM but excluded from Tables V and VI of ARMIS FCC Report 43-02. We reject this suggestion. The affiliate transaction tables in ARMIS were intended to be coextensive with the CAM. All affiliate transactions listed in the CAM are to be summarized in Tables V and VI of FCC Report 43-02.

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13 United Comments at 2.
14 *Id.* at 3.
15 USTA Comments at 3.
16 47 C.F.R. §36.
17 U S West Comments at 5.
18 Pacific Comments at 5-6.
19 Tennessee raises complex issues related to BellSouth for which no record has been developed and which go well beyond the scope of this proceeding. Accordingly, the issues raised by Tennessee cannot be decided here.
20 *Joint Cost Order*, 2 FCC Rcd 1298, 1328, § 240.
21 *See* 47 C.F.R. §32.9000.
22 --Fed. Reg. ----- (1991)(to be codified at 47 C.F.R. §64.903.); *see* Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards, 6 FCC Rcd 7571 (1991).
23 Section 64.903(a), for example, requires "each local exchange carrier" to file a manual containing information "regarding its allocation of costs between *regulated and nonregulated activities*". 47 C.F.R. §64.903(a) (emphasis added). Section 64.903 (a)(i) similarly requires that the manual include a description of "each of the *carrier's nonregulated activities*." 47 C.F.R. §64.903 (a)(i) (emphasis added). This use of the term "carrier" to refer to the entity that provides regulated telephone service, and not merely to the regulated activities of the entity, is consistent with §32.9000 of the Rules, which defines "carrier" for purposes of the Uniform System of Accounts as "any person engaged as a common carrier for hire." 47 C.F.R. §32.9000.

14. We reject SWB's contention that the *Order on Reconsideration* changed an existing rule regarding identification of affiliate transactions without proper rulemaking procedure. The *Order on Reconsideration* changed no rule and, of its own force, imposed no new requirement on any party other than United Telephone. It merely corrected our previous misinterpretation of one of the requirements of the *Joint Cost Order*. SWB is, of course, correct in its observation that the interpretation may affect other carriers that have not been listing all of their affiliate transactions in their CAMS. Such carriers are now on notice as to how the Bureau intends in future proceedings to interpret the CAM requirements. SWB is incorrect, however, in its apparent belief that notice and comment procedures were required because of this potential impact on other carriers. Neither the Administrative Procedures Act nor the Commission's Rules requires that notice and an opportunity to comment be given before we interpret our rules in a particular case.[24]

15. We also reject Pacific's argument that the *Order on Reconsideration* changed the applicability of §32.27 without proper rulemaking procedure. As explained above, the CAM requirement has no bearing on the applicability of §32.27.

V. ORDERING CLAUSE

16. Accordingly, IT IS ORDERED, That Southwestern Bell Telephone Company's Petition for Reconsideration is denied.

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

[24] *See* SEC v. Chenery, 332 U.S. 194 (1947).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
METROMEDIA LONG DISTANCE, INC.,
NTS COMMUNICATIONS, INC.,
RCI NETWORK SERVICES, INC.,
SCHNEIDER COMMUNICATIONS, INC.,
TELECOMMUNICATIONS SERVICES CORP.
(T/A TELSAVE),
TELEPHONE ASSOCIATES LONG
DISTANCE SERVICES, INC.,
U.S. LINK,
VALU-LINE OF ST.
JOSEPH, INC., and WESTEL, INC.,
Complainants,

v.

GTE NORTH INCORPORATED,	File No. E-91-165
GTE NORTHWEST INCORPORATED, and	File No. E-91-166
GTE SOUTHWEST INCORPORATED,	File No. E-91-167

Defendants.

ORDER

Adopted: July 1, 1992; **Released: July 10, 1992**

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent Communications Services, Inc., Communigroup of K. C., Inc., Garey M Wallace Company, Metromedia Long Distance, Inc., NTS Communications, Inc., RCI Network Services, Inc., Schneider Communications, Inc., Telecommunications Services Corp. (T/A TelSave), Telephone Associates Long Distance Services, Inc., U.S. Link, Valu-Line of St. Joseph, Inc., and Westel, Inc. (collectively "complainants"), may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Proce-

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainants when their overall interstate rates of return were below the authorized level.[9] Defendants also contend that an award of damages based on the measure advocated by complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[10]

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dures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

[7] Complainants also seek interest on this amount as well as costs. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Defendants contend that the relevant overall interstate rate of return is that of GTE's operating companies in the aggregate, not of each individual company. The Commission previously addressed and rejected this argument in the *MCI* and *AT&T Liability Orders*. *See, e.g.*, 5 FCC Rcd at 146 and 148 (1990). We find that the Commission's ruling is equally applicable to the defendants in this proceeding.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
GAREY M WALLACE COMPANY,
LONG DISTANCE SERVICE, INC.,
NATIONAL TELESERVICES, INC.,
NTS COMMUNICATIONS, INC., and
VALU-LINE OF ST. JOSEPH, INC.,
Complainants,

v.

CONTEL OF ARKANSAS, INC.,	File No. E-91-160
CONTEL OF KANSAS, INC.,	File No. E-91-161
CONTEL OF MISSOURI, INC.,	File No. E-91-162
CONTEL OF PENNSYLVANIA, INC., and	File No. E-91-163
CONTEL OF VIRGINIA, INC.,	File No. E-91-164

Defendants.

ORDER

Adopted: July 1, 1992; Released: July 10, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceedings to determine whether and to what extent Communications Services, Inc., Communigroup of K.C., Inc., Garey M Wallace Company, Long Distance Service, Inc., National Teleservices, Inc., NTS Communications, Inc., and Valu-Line of St. Joseph, Inc. (collectively "complainants"), may be entitled to recover damages as a result of the defendants' alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carriers (LECs) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant cases parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendants' liability for damages has been determined. We note that both complainants and defendants have argued the issue of liability extensively in their pleadings filed in the captioned cases.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of these complaint proceedings will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants in the instant complaints, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendants, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendants' alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendants for interstate access services during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendants' rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendants raise a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendants argue that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*.[8] and, therefore, unlawful. Defendants contend that the fact that their rates produced overearnings in one access service category is not sufficient to establish damage to complainants. Defendants also contend that an award of damages based on the measure advocated by complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*.

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendants' alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendants' alleged rate of return violations could be the difference between the rates they actually paid for defendants' interstate access services and the rates they would have paid if defendants' rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendants are found to be liable. On the contrary, it is conceivable that for the relevant service categories defendants may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of their access service offerings to establish or support their claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendants' excessive earning levels. Moreover, defendants' factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendants that would tend to show that complainants' share of the excessive earnings realized by defendants in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendants for the relevant monitoring period. We will also consider any other evidence submitted by defendants that would refute complainants' claim that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendants' rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendants to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendants' access services during the relevant monitoring period and the amount complainants would have paid if defendants' rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendants the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendants.[9]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendants written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the defendants may perform the calculation and provide this information to the complainants within the thirty-day period.

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[7] Complainants also seek interest on this amount as well as costs. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceedings will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

9. IT IS FURTHER ORDERED THAT the complainants and the defendants may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendants shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendants shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SERVICES, INC.,
COMMUNIGROUP OF K.C., INC.,
METROMEDIA LONG DISTANCE, INC.,
TELAMARKETING CORP. OF LOUISIANA, and
TOTAL-TEL USA,
Complainants,

v.

CINCINNATI BELL TELEPHONE COMPANY, Defendant. File No. E-91-159

ORDER

Adopted: July 1, 1992; Released: July 10, 1992

By the Deputy Chief, Enforcement Division, Common Carrier Bureau:

I. INTRODUCTION

1. In this Order we address discovery issues and establish a schedule for further discovery and the submission of briefs and reply briefs by the parties to the above-captioned proceeding to determine whether and to what extent Communications Services, Inc., Communigroup of K. C., Inc., Metromedia Long Distance, Inc., TelaMarketing Corp. of Louisiana, and Total-Tel USA (collectively "complainants"), may be entitled to recover damages as a result of the defendant's alleged violations of the Commission's rate of return prescription for the period January 1, 1987 through December 31, 1988.

II. BACKGROUND

2. The case that complainants present against the defendant local exchange carrier (LEC) is virtually identical to those presented in *MCI Telecommunications Corporation v. Pacific Northwest Bell Telephone Co.*[1] and *American Telephone & Telegraph Co. v. Northwestern Bell Telephone Co.*[2] In those cases, the Commission found that MCI and AT&T had met their burden of establishing that the defendant LECs had violated Section 201(b) of the Communications Act by earning in excess of the Commission's prescribed rate of return for the 1985-1986 monitoring period[3] and were liable for damages to the extent that MCI and AT&T could establish that they suffered actual damage as a result of the violations. The Commission, however, addressed the issue of liability only and directed AT&T and MCI to file supplemental complaints for damages if they wished to pursue their damages claims. Both AT&T and MCI subsequently filed such supplemental complaints and related pleadings. We recently issued orders in the AT&T and MCI supplemental proceedings that established guidelines and timeframes for further discovery and briefs on the issue of damages.[4]

3. Because the operative facts and questions of law involved in the instant case parallel those raised in the AT&T and MCI proceedings, we will not adopt the bifurcated approach used by the Commission in those proceedings and postpone discovery and the submission of additional pleadings on the issue of damages until defendant's liability for damages has been determined. We note that both complainants and defendant have argued the issue of liability extensively in their pleadings filed in the captioned case.[5] We believe that the Commission's, as well as the parties', interests in obtaining the earliest practicable resolution of this complaint proceeding will be better served by requiring the parties to develop a full record on the issue of damages as well as liability at this time.[6]

III. DISCUSSION

4. Initially, we note that the issue of damages in a Section 208 complaint proceeding involves an issue of fact, the resolution of which depends on the particular circumstances involved in the case. Complainants' damages claims rest primarily on the contention that the proper measure of the damages they have incurred as a result of defendant's alleged violations of the Commission's rate of return prescription is the difference between the amount they actually paid defendant for interstate access services

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[1] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[2] 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom.* Mountain States Tel. and Tel. Co., *et al.* v. FCC, 951 F.2d 1259 (10th Cir. 1991).

[3] MCI and AT&T relied, as do complainants in the instant complaint, on rate of return monitoring reports (Form 492) filed with the Commission by the defendants as required by Section 65.600 of the Commission's rules. *See* 47 C.F.R. § 65.600.

[4] *See MCI Telecommunications Corporation v. Pacific Bell Tel. Co.*, 7 FCC Rcd 2985 (Com.Car.Bur. 1992) (*MCI Discovery Order*) and *AT&T Communications v. Northwestern Bell Tel. Co.*, 7 FCC Rcd 2982 (Com.Car.Bur. 1992).

[5] Complainants and defendant, should they so choose, are free to discuss the issue of liability in the briefs and reply briefs required by this Order.

[6] We note that the Commission has pending a rulemaking proceeding that solicits comments on, *inter alia*, a proposal that would amend the Commission's rules to prohibit any discovery regarding damages until after the Commission has decided the issue of liability. *See* Amendment of Rules Governing Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, CC Docket No. 92-26, 7 FCC Rcd 2042 (1992). Our decision here not to bifurcate damages and liability for purposes of completing discovery should not be viewed as prejudging the merits of the Commission's proposal. Rather, it reflects the protracted history and unique circumstances underlying these rate of return complaint proceedings and our desire to resolve these matters as expeditiously as possible.

during the period January 1, 1987 through December 31, 1988, and the amount they would have paid if defendant's rates had produced earnings that did not exceed the Commission's prescribed rate of return.[7]

5. Defendant raises a number of challenges to complainants' damages claims, including arguments that have been considered and rejected by the Commission in the *MCI* and *AT&T Liability Orders*. Defendant argues that any damages awards based on violations of the Commission's rate of return prescription would be contrary to the court's decision in *American Telephone and Telegraph Company v. FCC*[8] and, therefore, unlawful. Defendant maintains that, . under *AT&T v. FCC*, it must be allowed to offset overearnings against underearnings. Defendant also contends that an award of damages based on the measure advocated by complainants would effectively reinstate the automatic refund rule found unlawful in *AT&T v. FCC*. Finally, defendant argues that even assuming that violations of the Act and actual damages in consequence thereof can be established, it would be inequitable to award damages to complainants because complainants would not flow through such damages to their own customers.[9]

6. We have carefully reviewed the pleadings of the parties and are unable to resolve on the record before us the substantial factual issues raised by the parties regarding the extent to which complainants may have suffered actual damage as a consequence of defendant's alleged violations of the Commission's rate of return prescription. We tend to agree with complainants, in principle, that a possible measure of the damages stemming from defendant's alleged rate of return violations could be the difference between the rates they actually paid for defendant's interstate access services and the rates they would have paid if defendant's rates had produced earnings within the authorized levels. We are not, however, persuaded on the record before us that a damages determination based on such a measure would necessarily reflect actual damages due to complainants in the event that defendant is found to be liable. On the contrary, it is conceivable that for the relevant service categories defendant may be able to produce evidence or identify circumstances surrounding or impacting complainants' taking of its access service offerings to establish or support its claims that complainants suffered no actual harm or incurred no ascertainable damages attributable to defendant's excessive earning levels. Moreover, defendant's factual showings could serve to mitigate or otherwise reduce complainants' damages claims. We will, for example, consider any evidence submitted by defendant that would tend to show that complainants' share of the excessive earnings realized by defendant in a particular access category should be offset or otherwise reduced because of facts and circumstances surrounding complainants' purchase of other interstate access services from defendant for the relevant monitoring period. We will also consider any other evidence submitted by defendant that would refute complainants' claims that the damage they suffered should be measured by the difference between the rates actually charged and the rates that would have been charged if defendant's rates had produced earnings at or within the authorized level on an individual category basis.

IV. CONCLUSION

7. In order to facilitate a resolution of the factual questions posed by the parties in their pleadings, and to assure that the parties have a full and fair opportunity to present their claims, we will require defendant to make available to complainants information necessary to compute the difference between the amount complainants actually paid for defendant's access services during the relevant monitoring period and the amount complainants would have paid if defendant's rates had produced earnings at the Commission's prescribed rate of return during that period. We will also afford defendant the opportunity to develop evidence of offsets or other mitigating factors with regard to damages as discussed in paragraph 6 herein. Finally we will establish a timeframe for additional discovery and the filing of briefs and reply briefs by complainants and defendant.[10]

V. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 4(i), of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated by Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, within 10 days of the release date of this Order, the complainants may direct to the defendant written requests for the information necessary to perform the computation discussed in paragraph 7 herein. Such discovery shall be completed and all documents exchanged within 30 days of the release date of this Order. In the alternative, the

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[7] Complainants also seek interest on this amount. We note that defendant argues that the Commission has no authority to award interest in a Section 208 complaint proceeding. Although an award of interest does not fall squarely within the ambit of Section 208 of the Communications Act, the Commission's authority under Section 4(i) and other sections of the Act to award interest in a common carrier complaint proceeding is well established. *See MCI Discovery Order* at para. 15. Whether an award of interest is appropriate in the instant complaint proceeding will depend on the particular facts established by the parties.

[8] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*). The court set aside the automatic refund rule adopted by the Commission in Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, Phase I, FCC 85-527 (released Sept. 30, 1985), 50 Fed. Reg. 41,350 (Oct. 10, 1985), *modified on reconsideration*, Memorandum Opinion and Order, FCC 86-114 (released March 24, 1986), 51 Fed. Reg. 11,033 (Apr. 1, 1986), *further recon. denied*, 2 FCC Rcd 190 (1987). The court found the automatic refund mechanism to be arbitrary and capricious "because it is inconsistent with the rate of return prescription it purports to enforce." *AT&T v. FCC*, 836 F.2d 1386, 1390. The court acknowledged, however, that "the Commission has authority under the Act to order refunds where a carrier has violated an outstanding rate-of-return prescription." *Id.*, 836 F.2d at 1392.

[9] We do not reach that issue in this interlocutory ruling. We are concerned here only with establishing a schedule for further discovery and briefing.

[10] Section 208 provides in pertinent part that it shall be the duty of the Commission to investigate unsatisfied complaints "in such manner and by such means as it shall deem proper." 47 U.S.C. § 208.

defendant may perform the calculation and provide this information to the complainants within the thirty-day period.

9. IT IS FURTHER ORDERED THAT the complainants and the defendant may develop, through discovery, additional information regarding the calculation of damages for the relevant monitoring period consistent with the guidelines set out in paragraph 6 herein. Such discovery shall be initiated within 10 days of the release date of this Order and be completed and all documents exchanged within 30 days of the release date of this Order.

10. IT IS FURTHER ORDERED THAT the complainants and the defendant shall file their initial briefs no later than 20 days after the close of the thirty-day discovery period and that the complainants and the defendant shall submit reply briefs no later than 10 days after the submission of initial briefs.

FEDERAL COMMUNICATIONS COMMISSION

Gregory A. Weiss
Deputy Chief (Operations)
Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY — File No. 26797-CD-R-01-88

For license renewal for station KCA207 in the Public Land Mobile Service at Andover, Massachusetts

NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY and RADIO TELEPHONE SYSTEMS, INC. — File No. 20308-CD-AL-01-89

For assignment of stations in the Public Land Mobile Service at various locations in Massachusetts, Maine, Vermont, New Hampshire and Rhode Island

RADIO TELEPHONE SYSTEMS, INC. — File No. 31552-CD-P/ML-01-89

For facilities in the Public Land Mobile Service at Waltham, Massachusetts for station KCA671

RADIO CALL COMPANY, INC. — File No. 21055-CD-P/ML-01-89

For facilities in the Public Land Mobile Service at Boston, Massachusetts for station KNKK486

RADIO CALL COMPANY, INC. — File No. 21056-CD-P/ML-01-89

For facilities in the Public Land Mobile Service at Paxton, Massachusetts for station KNKK486

MEMORANDUM OPINION AND ORDER

Adopted: June 30, 1992; **Released: July 10, 1992**

By the Commission:

I. INTRODUCTION

1. In this order we address an application for review filed by Radio Call Company, Inc. (Radio Call) in the matter of *New England Telephone and Telegraph Company*, 6 FCC Rcd 5088 (Com. Car. Bur. 1991). The Common Carrier Bureau (Bureau) order dismissed two Radio Call Public Land Mobile Service (PLMS) modification applications. For the reasons discussed below, Radio Call's application for review is denied.

II. BACKGROUND

2. Radio Call filed applications to modify two existing PLMS facilities in Massachusetts.[1] New England Telephone and Telegraph Company (NET) filed a petition to deny Radio Call's applications because, it claimed, the proposed modifications would cause interference to NET's PLMS Station KCA207 at Andover, Massachusetts. Radio Call acknowledged the interference problem but argued that Station KCA207 had been abandoned. Radio Call also filed petitions to deny against two pending NET applications for license renewal and assignment of Station KCA207. The Mobile Services Division (MSD) found that Station KCA207 had not been abandoned, denied Radio Call's request for a hearing on the abandonment issue and granted the NET applications.[2] The Common Carrier Bureau (Bureau) affirmed these actions, including denial of the hearing request on the issue of abandonment.[3] The Bureau also dismissed Radio Call's applications because the proposed modifications would cause interference to Station KCA207. Radio Call has now filed an application for review.

III. DISCUSSION

3. Radio Call contends that in denying the request for a hearing on abandonment, the Bureau failed to properly apply the two-step test provided in subsections (1) and (2) of Section 309(d) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. Section 309(d), and discussed in *Citizens for Jazz on WRVR, Inc.*, 775 F.2d 392 (D.C. Cir. 1985) and *Gencom, Inc. v. FCC*, 832 F.2d 171 (D.C. Cir. 1987). Radio Call argues that the Bureau erred because it failed to determine whether Radio Call's petition to deny, by itself, raised a substantial and material question of fact requiring a hearing. Radio Call also argues that the Bureau erred when it found that Radio Call's allegations did not present a prima facie case that the applications should not be granted. Finally, Radio Call argues that the Bureau co-mingled the two parts of the Section 309(d) analysis and required Radio Call to prove its case rather than merely to raise a substantial and material question of fact.

4. Section 309(d) requires that the Commission consider allegations raised in a petition to deny an application using a two-step analysis. *See Astroline Communications Co. L.P. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988). Pursant to Section 309(d)(1) the Commission first reviews the petition to deny and supporting affidavits, and determines whether there are "specific allegations of fact sufficient to show that . . . grant of the application would be prima facie inconsistent with [the public interest]." *Id.*; *see also Arnold L. Chase*, 5 FCC Rcd 1642, 1645 (1990). If this threshold test is not met, the petition is dismissed and no evidentiary hearing is held. If the threshold test is met, the second test as outlined in subsection (d)(2) of Section 309 is applied.

Under Section 309(d)(2) the Commission considers the application, all of the pleadings and any other matters of which it may take official notice. *See Gencom, Inc. v. FCC*, 832 F.2d 171, 181 (D.C. Cir. 1987). If there are no substantial and material questions of fact and if a grant of the application would be consistent with the public interest, convenience, and necessity, the Commission then should grant the application, deny the petition, and issue a concise statement of the reasons for denying the petition. If the Commission is faced with a substantial and material question of fact or if the Commission for any reason can not find that grant of the application would be in the public interest, convenience, or necessity, it shall designate the application for a hearing. *See* Section 309(d)(2) of the Act.

5. We do not need to resolve the issue of whether the Bureau improperly determined that Radio Call had not presented a prima facie case because, even assuming, *arguendo*, that Radio Call's petition presented a prima facie case under Section 309(d)(1), we find that there is no substantial and material question of fact requiring a hearing under Section 309(d)(2). Contrary to Radio Call's suggestion, the determination of whether there is a substantial and material question of fact is not made on the basis of the petition alone. All relevant evidence is considered, as required by Section 309(d)(2). After reviewing the evidence in this case, we find that there is no substantial and material question of fact regarding abandonment. The Commission's rules define abandonment as non-operation for 90 continuous days. *See* Section 22.303 of the Commission's rules. Radio Call relies on statements by two engineers, one indicating that he monitored Station KCA207 from September 15, 1988 through November 18, 1988, and another stating that he monitored the station from March 1988 through November 1988, and the results of the monitoring were that the station was silent. However, the engineers do not state that their monitoring was continuous, do not indicate the dates or times when the monitoring was conducted, and refer to only one of the two frequencies licensed to Station KCA207.[4] Furthermore, NET has explained that there were numerous outages during the period at issue, but that these periods of non-operation were not continuous and the problems were corrected. NET has also submitted information showing that Station KCA207 carried traffic and earned revenues in every month during the period of alleged non-operation, and that the station had subscribers during this period.

6. Based on the above evidence, we agree with the Bureau's finding that there is no substantial and material question of fact regarding abandonment and that an evidentiary hearing is unnecessary in this case.[5] Accordingly, we affirm the Bureau order and deny Radio Call's application for review.

IV. ORDERING PARAGRAPH

7. Accordingly, IT IS ORDERED THAT the Application for Review filed by Radio Call Company, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The modifications involved Station KNKK486 at Boston and Paxton, Massachusetts.

[2] *See New England Telephone and Telegraph Company*, 4 FCC Rcd 6434 (Mob. Serv. Div. 1989) (granting assignment of Station KCA207 from NET to Radio Telephone Systems, Inc.); and Public Notice Report No. 89-52-A (released September 27, 1989) (granting license renewal for Station KCA207).

[3] The Bureau order also affirmed grant of an application for assignment of several other NET stations, as well as a Radio Telephone Systems, Inc. modification application.

[4] Station KCA207 is licensed to operate on frequency 454.625 MHz at Andover, Massachusetts and frequency 152.570 MHz at Haverhill, Massachusetts.

[5] Radio Call also argues that the Bureau erred in considering a Field Operations Bureau (FOB) report because the report was based on an inspection that occurred after the period of alleged non-operation. However, we find that, even without considering the FOB report, there is no substantial and material question of fact regarding the abandonment of Station KCA207 during the period covered by Radio Call's allegations.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CABLE & WIRELESS COMMUNICATIONS, INC. File No. I-T-C-88-157

Application for authority to resell the services of other common carriers for the provision of switched voice service from the U.S. to Hong Kong

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: July 2, 1992; Released: July 10, 1992

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. The above-captioned application, filed by Cable & Wireless Communications, Inc. (CWCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell, pursuant to contract, the switched voice services of TRT/FTC International, Inc. (TRT/FTC) from the U.S. to Hong Kong.[1] In this decision, we grant CWCI's request to provide international switched voice services from the U.S. to Hong Kong by the resale of the international switched voice services of TRT/FTC, subject to the conditions set forth below.

II. THE APPLICATION

2. CWCI is a common carrier authorized to provide, *inter alia*, switched voice services on a resale basis to numerous international points. CWCI is a wholly-owned indirect subsidiary of Cable and Wireless plc, a company organized under the laws of the United Kingdom that provides telecommunications services throughout the world. As a result, CWCI is a foreign-owned carrier under the Commission's decision in *International Competitive Carrier Policies*, 102 FCC 2d 812, 842 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986), and is regulated as dominant in its provision of international common carrier services between the U.S. and international points.

3. In its application, CWCI states that international switched voice services to Hong Kong are currently offered by AT&T, MCI, and US Sprint, among others. CWCI states that it also provides such services via resale of other common carrriers' switched services. It explains that the resale arrangement proposed in the instant application will lower its operational costs and thereby enhance competition. The application is uncontested.[2]

III. DISCUSSION

4. In this order, we find that the grant of CWCI's application will serve the public interest, subject to certain conditions set forth below. We note that we have authorized U.S. carriers to provide international telecommunications services by resale of U.S. international switched services, including international message telephone service (IMTS), since 1980. [3] In the authorization of new entrants, the Commission has consistently sought to limit opportunities for discrimination by foreign telecommunications providers against U.S. international carriers.[4] In this instance, even though CWCI's affiliate Hong Kong Telecom[5] retains a monopoly over virtually all international telecommunications services to and from Hong Kong, we conclude that CWCI's ability to discriminate against competing carriers would be limited by the fact that it will only provide resale services over switched service capacity obtained from circuits authorized to TRT/FTC.

5. In view of the foregoing, and in order to ensure non-discriminatory treatment among competing U.S. carriers, we grant CWCI's application subject to the express condition that the terms, conditions, and rates under which CWCI obtains service from TRT/FTC be publicly filed by TRT/FTC and generally available to similarly situated customers.

IV. ORDERING CLAUSES

6. Upon consideration of the application and in view of the foregoing, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of resale of international switched voice service by CWCI from the United States to Hong Kong.

7. Accordingly, IT HEREBY IS ORDERED that application File No. I-T-C-88-157 IS GRANTED, and CWCI is authorized to provide international switched voice services from the U.S. to Hong Kong by the resale of the international switched voice services of TRT/FTC pursuant to the contract between TRT/FTC and CWCI dated September 3, 1991, provided that the services CWCI obtains from TRT/FTC be publicly filed by TRT/FTC and generally available to similarly situated customers at the same terms, conditions and rates.

8. IT IS FURTHER ORDERED that CWCI must seek specific additional authority from the Commission to resell the international switched voice services of TRT/FTC offered pursuant to any modification of the contract between TRT/FTC and CWCI dated September 3, 1991.

9. IT IS FURTHER ORDERED that CWCI shall file copies of any operating agreements entered into by itself, or by its parent/affiliate companies, that affect traffic or revenue flows to or from the United States within 30 days of their execution.

10. IT IS FURTHER ORDERED that CWCI shall file quarterly reports of revenue, number of messages, and number of minutes of both originating and terminating traffic for all international services between the U.S. and all countries CWCI is authorized to serve within 90 days from the end of each calendar quarter.

11. IT IS FURTHER ORDERED that the applicant shall file tariff provisions pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

12. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. Section 43.61.

13. IT IS FURTHER ORDERED that CWCI shall not bargain for, nor agree to receive, any return traffic from Hong Kong Telecom International Ltd.

14. IT IS FURTHER ORDERED that neither CWCI, nor any persons or companies directly or indirectly controlling it or controlled by it, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which CWCI or any such persons or companies are parties.

15. This Order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

Cheryl A. Tritt
Chief, Common Carrier Bureau

FOOTNOTES

[1] TRT/FTC received Section 214 authorization to provide switched voice service between the United States and Hong Kong in File No. I-T-C-88-173.

[2] We issued Public Notice of the application on July 6, 1988, Report No. I-6228. C&W subsequently submitted to the Commission a revised contract for service with TRT/FTC, dated September 3, 1991. We issued Public Notice of this contract on October 2, 1991, Report No. I-6618.

[3] *See ITT World Communications, Inc. v. Consortium Communications International, Inc.*, 76 FCC 2d 15 (1980).

[4] *See generally Regulation of International Common Carrier Services*, CC Docket No. 91-360, *Notice of Proposed Rulemaking*, 7 FCC Rcd 577 (1992).

[5] CWCI's indirect parent company, Cable and Wireless plc, is the majority shareholder of Hong Kong Telecom International Ltd., which is the exclusive provider of basic international services in Hong Kong.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MELBOURNE INTERNATIONAL COMMUNICATIONS, LIMITED — File No. I-T-C-92-101

For Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Establish Channels of Communications Between the United States and International Locations for the Provision of IBS, IDR, DataNet and ITS Via INTELSAT Satellites and for the Provision of Private Line Service Via the Pan American Satellite System

ORDER AND AUTHORIZATION

Adopted: July 2, 1992; Released: July 10, 1992

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned unopposed application, filed February 11, 1992 pursuant to Section 214 of the Communications Act of 1934, as amended, we find that the public convenience and necessity requires a grant thereof.

2. Accordingly, IT IS ORDERED that the application File No. I-T-C-92-101 IS GRANTED, and Melbourne International Communications, Limited (MICL), is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT Atlantic Ocean Region (AOR) and Pacific Ocean Region (POR) satellites for the provision of International Business Service (IBS) and International Television Service (ITS) between the United States and countries listed in Comsat's tariff F.C.C. No. 103 for the space segment of IBS and ITS.

3. IT IS FURTHER ORDERED that MICL is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and INTELSAT AOR and POR satellites for the provision of International Digital Route Service (a/k/a Intermediate Data Rate Service) (IDR) between the U.S. and Venezuela, Chile, Brazil, Argentina, Guatemala, Costa Rica, Peru, Nicaragua, Mexico, El Salvador, Bolivia, Panama, and Colombia.

4. IT IS FURTHER ORDERED that MICL is authorized to establish channels of communications between appropriately licensed earth stations in the U.S. and the PAS-1 satellite for the provision of private line service, not interconnected with the public switched network, between the U.S. and those countries listed in Appendix A, which PAS is authorized to serve, not to exceed one T-1 circuit to each country.

5. IT IS FURTHER ORDERED that MICL is restricted in its communications with the PAS-1 satellite to the provision of capacity through the sale or lease of transponder capacity for communications not interconnected with the public switched networks (except for emergency restoration services).

6. IT IS FURTHER ORDERED that the authorization to use the PAS-1 satellite is subject to Commission jurisdiction over the use of all space segment within the PAS system to ensure compliance with the restrictions placed on the operation of separate satellite systems.

7. IT IS FURTHER ordered that the authority granted herein for MICL to establish channels of communication between the earth stations in the U.S. and the PAS-1 and INTELSAT satellites does not dispense with the requirement that all such earth stations must be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

8. This authorization is not to be construed as permitting the provision of any services between earth stations located within the U.S.

9. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between MICL and its correspondents, and a copy of any agreement shall be filed with the Commission within 30 days of its execution.

10. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

11. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

12. IT IS FURTHER ORDERED that the applicant shall file a separate Section 214 application to acquire any additional circuits over the PAS-1 system.[1]

13. This order is issued pursuant to Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (see Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

C-band Countries	Ku-band Countries
Argentina	Bahamas
Bahamas	Denmark
Barbados	France
Bolivia	Germany
Brazil	Ireland
Chile	Italy
Columbia	Luxembourg
Costa Rica	Monaco
Dominican Republic	The Netherlands
Ecuador	Portugal
Guatemala	Sweden
Honduras	United Kingdom
Peru	
Panama	

FOOTNOTE

[1] *See International Competitive Carrier*, 102 F.C.C. 2d 812, 845 (1985).

Before the
Federal Communications Commission
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION

Douglas W. Webbink
Chief, Policy and Rules Division
Mass Media Bureau

MM Docket No. 89-17

In the Matter of

Amendment of Section 73.202(b),	RM-6543
Table of Allotments,	RM-6732
FM Broadcast Stations.	RM-6733
(Warren Grove, Tuckerton	
and Manahawkin, New Jersey)	

MEMORANDUM OPINION AND ORDER

Adopted: June 22, 1992; Released: July 10, 1992

By the Chief, Policy and Rules Division:

1. The Commission has before it a Petition for Reconsideration of the *Report and Order* (*"R&O"*), 4 FCC Rcd 7821 (1989), filed by Jersey Shore Broadcasting Corporation ("Jersey Shore"), licensee of Station WJRZ(FM), Channel 261A, Manahawkin, New Jersey. The *R&O* in this proceeding allotted FM Channel 289B1 to Manahawkin, New Jersey, and Channel 259A to Tuckerton, New Jersey.

2. Jersey Shore petitioned the Commission to reconsider the allotment of Channel 289B1 to Manahawkin and Channel 259A to Tuckerton. Jersey Shore originally filed a counterproposal in the above proceeding requesting the substitution of Channel 289B1 for Channel 261A at Manahawkin, New Jersey and the modification of the license for Station WJRZ(FM) accordingly. However, we declined to modify the license for WJRZ(FM) because there was no equivalent channel available to accommodate competing expressions of interest filed for Channel 289B1 at Manahawkin. As a result, a filing window was opened for the Manahawkin channel. Jersey Shore and thirteen other parties applied for the channel. Subsequently, the applicants, including Jersey Shore, filed a settlement agreement.[1] Therefore, Jersey Shore now requests the dismissal of its Petition for Reconsideration.

3. In view of the foregoing, IT IS ORDERED, That the Petition for Reconsideration filed by Jersey Shore Broadcasting Corporation IS HEREBY DISMISSED.

4. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

5. For further information concerning this proceeding, contact Arthur D. Scrutchins, Mass Media Bureau, (202) 634-6530.

[1] The application of Press Broadcasting Company (formerly LD Broadcasting Limited Partnership), was granted by *Memorandum Opinion and Order*, FCC 91M-2893, released September 23, 1991.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-142

In the Matter of

Amendment of Section 73.202(b), RM-8014
Table of Allotments,
FM Broadcast Stations.
(Brighton, New York)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 19, 1992; Released: July 10, 1992

Comment Date: September 1, 1992
Reply Comment Date: September 16, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Renard Communications Corp. ("petitioner") requesting the allotment of Channel 231A to Brighton, New York, as the community's first local FM service. Petitioner states that it will apply for the channel, if allotted.[1]

2. We believe the public interest would be served by proposing the allotment of Channel 231A to Brighton, since it could provide the community with its first local FM transmission service. Channel 231A can be allotted to Brighton in compliance with the Commission's minimum distance separation requirements with a site restriction of 8.1 kilometers (5 miles) east to avoid a short-spacing to Station WACZ, Channel 230A, Dansville, New York.[2] We recognize that this allotment would be short-spaced to Stations CBL-FM, Channel 231C1, Toronto, Ontario, and CBBB-FM, Channel 232B, Belleville, Ontario, Canada. However, we have determined that a station can limit its power in the direction of these stations and avoid any prohibited interference. Therefore, since Brighton is located within 320 kilometers (200 miles) of the U.S. Canadian border, we will request concurrence in the allocation of Channel 231A to Brighton as a specially negotiated allotment.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Brighton, New York	--	231A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 1, 1992,** and reply comments on or before **September 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Craig L. Fox, President
Renard Communications Corp.
4853 Manor Hill Drive
Syracuse, New York 13215-1336
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules,* 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] Section 1.52 of the Commission's Rules requires that a petitioner sign and verify all petitions and pleadings unless represented by counsel. While the petitioner did sign the petition, it failed to include a verification statement. Petitioner is therefore requested to do so in comments herein. Failure to comply with Section 1.52 of the Rules may result in the dismissal of its request.

[2] The coordinates for Channel 231A at Brighton are North Latitude 43-08-55 and West Longitude 77-27-04.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-143

In the Matter of

Amendment of Section 73.202(b), RM-8010
Table of Allotments,
FM Broadcast Stations.
(Eagle, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 22, 1992; Released: July 10, 1992

Comment Date: September 1, 1992
Reply Comment Date: September 16, 1992

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Eagle Broadcasting, Inc. ("petitioner"), requesting the substitution of Channel 300C for Channel 300C2 at Eagle, and the modification of Station KRVG(FM)'s construction permit to specify Channel 300C. Petitioner states that it will apply for the channel, if allotted.

2. We believe the petitioner's proposal warrants consideration since it could provide a wider coverage area FM station to Eagle. An engineering analysis has determined that Channel 300C can be substituted for Channel 300C2 at Eagle in compliance with the Commission's minimum distance separation requirements at the site specified in the construction permit, without the imposition of a site restriction.[1] We shall also propose to modify petitioner's construction permit to specify operation on Channel 300C in lieu of Channel 300C2 at Eagle. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in the use of the higher class channel at Eagle or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

3. In view of the fact that Eagle could receive an expanded FM channel the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Eagle, Idaho	300C2	300C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **September 1, 1992,** and reply comments on or before **September 16, 1992,** and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Gerald Stevens-Kittner
Lisa E. Kopf
Arter & Hadden
1801 K Street, N.W.
Suite, 400K
Washington, D.C. 20006
(Attorneys for Eagle Broadcasting, Inc.)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 300C at Eagle are North Latitude 43-45-18 and West Longitude 116-05-52.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

Michael C. Ruger
Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

MM Docket No. 92-73

In the Matter of

Amendment of Section 73.202(b), RM-7954
Table of Allotments,
FM Broadcast Stations.
(Warrenton, Georgia)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: June 22, 1992; Released: July 10, 1992

By the Chief, Allocations Branch:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 7 FCC Rcd 2322 (1991) issued in response to a petition for rule making filed on behalf of William P. Eaton ("petitioner"). Petitioner had originally requested an allotment of Channel 232A to Warrenton, Georgia, as that community's second local FM transmission service.[1] The *Notice* indicated that the Commission believed an allotment to Warrenton would be in the public interest, but noted that Channel 232A was not available due to a conflict with an allotment of Channel 232A at Gibson, Georgia. The *Notice* instead proposed the allotment of Channel 254A to Warrenton and invited comments on that proposal. No party filed comments in response to the *Notice*.

2. As stated in the *Notice of Proposed Rule Making*, a showing of continuing interest is required before a channel will be allotted. It is the Commission's policy to refrain from making allotments to a community absent an expression of interest. Therefore, since there has been no expression of interest here, we will dismiss petitioner's proposal.

3. Accordingly, IT IS ORDERED, That the petition of William P. Eaton, requesting an allotment to Warrenton, Georgia, IS HEREBY DISMISSED.

4. IT FURTHER ORDERED, That the petition for reconsideration filed on behalf of William P. Eaton IS HEREBY DISMISSED.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Elizabeth Beaty, Mass Media Bureau, (202) 634-6530.

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[1] Petitioner's request was orginially returned by letter as short spaced to a counterproposal in MM Docket No. 89-404. *See* Letter to John E. Fiorini, III (Counsel to William P. Eaton), from Karl A. Kensinger, Chief, Allocations Branch, dated February 7, 1990. Petitioner filed a petition for reconsideration of the action, requesting reinstatement of its petition. The availablity of an alternate channel for Warrenton obviated the need to resolve the petition for reconsideration. However, due to the lack of continuing interest in the proposed channel, both that proposal and the petition for reconsideration are dismissed herein.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-96

In re Applications of

SUNBELT LIMITED PARTNERSHIP	File No. BPH-880308ME
TROY BROADCASTING CORPORATION	File No. BPH-880310MJ
RALPH W. BLACK, JR.	File No. BPH-880310MT

For Construction Permit for
New FM Station, Channel 234A,
Brundidge, Alabama

Appearances

John A. Borsari, Esquire on behalf of Sunbelt Limited Partnership; *M. Scott Johnson, Esquire* and *James K. Edmundson, Esquire* on behalf of Troy Broadcasting Corporation; and *Stephen T. Yelverton, Esquire* on behalf of Ralph W. Black, Jr.

DECISION

Adopted: June 30, 1992; Released: July 10, 1992

By the Review Board: MARINO (Chairman), and ESBENSEN. Board Member BLUMENTHAL absent.

Board Chairman MARINO:

1. All three applicants have filed exceptions to the *Initial Decision* (I.D.) of Administrative Law Judge Edward J. Kuhlmann (ALJ), 6 FCC Rcd 574 (1991), which held that Troy Broadcasting Corp. was the superior comparative applicant. The decisional issues which have emerged from our review of the parties' exceptions and other pleadings are:

Whether Ralph W. Black, Jr. (Black) was financially qualified.

Whether controlling Commission precedent mandates that Sunbelt Limited Partnership's (Sunbelt) integration credit should be substantially reduced.

Whether Troy Broadcasting Corp. (Troy) abused Commission processes by terminating the employment of Ralph W. Black, Jr., its competing applicant in this case.

For the reasons set out below we affirm the ALJ's selection of Troy.

2. **BLACK'S FINANCES**: Three separate issues were designated for hearing to ascertain if Black was financially qualified; if Black falsely certified his financial qualifications, and whether Black submitted false documents to establish that he was financially qualified. I.D., para. 1, Issues 2, 3 and 4. After making specific findings, I.D., paras. 4-20, the ALJ resolved the three issues against Black. I.D., paras. 47-52. In essence, the ALJ held that: the objective evidence did not support a finding that Black is financially qualified, I.D., paras. 48, 51; Black failed to establish that his certification was made in good faith, on the contrary, his response to this issue "has not been truthful and reliable," I.D., para. 52; and Black lied and presented "inconsistent and deceptive" testimony to establish that a "document which purports to be an accounting of Baker's [his lender's] assets was contemporaneous with his financial certification." I.D., para. 53, 56. The ALJ also found that "[i]n 1951, Black was sentenced to jail for fraudulently and repeatedly passing 'bad checks'," spending either one or four days in jail. I.D., para. 14.

3. Black has filed exceptions to the ALJ's resolution of all three issues (Br. 2-23). In accordance with past Board practice, which has been approved by the Commission, *see e. g., Aspen FM, Inc.*, 6 FCC Rcd 1602 (1991), and *Texas Communications Limited Partnership*, 6 FCC Rcd 5191 (1991), *recon. denied*, 7 FCC Rcd 3189 (1992), we need not first reach qualification issues which turn on subjective matters such as "good faith", and "conscious intent to deceive." *See e. g.*, cases cited in *Georgia Public Telecommunications Commission*, 7 FCC Rcd 2942, 2948 para. 32 (Rev. Bd. 1992). Black, himself, has stated on appeal that the *first* decisional issue (Br. 2-7) is whether the ALJ erred in determining that Black was not financially qualified. We turn now to that issue.

4. "When an individual, and not a financial institution is a source of funds, the applicant must demonstrate that it ascertained, at the time of certification, that the individual has sufficient resources to meet his financial commitment. *See Aspen*, 6 FCC Rcd at 1603 ¶ 8." *Texas Communications Limited Partnership*, 7 FCC Rcd at 3187 para. 7. It is undisputed that from the outset Black intended to finance his proposed station with a $110,000 loan as evidenced by a letter dated March 7, 1988 from a local businessman named Harry F. Baker. I.D., para. 4. However, the ALJ, after fully reviewing the record evidence, concluded that "Black had no objective evidence to support his assumption that Baker had the necessary liquid assets." I.D., para. 48. The ALJ's findings (I.D., paras. 6-7) establish that:

> Black conceded that he had never seen a balance sheet or financial statements for Baker. Tr. 432, 619. Mr. Baker testified he never gave Mr. Black any other document except the March 7, 1988 letter. Tr. 626. Baker stated that he did not verify his net liquid assets with an accountant or a banker. Tr. 621. Black did testify that when he met with Mr. Baker in March 1988, Mr. Baker showed him a Merrill Lynch statement. Tr. 432. Black represented that Baker pulled the statement from a drawer and told him what was on the statement. *Id.* But Black did not examine it enough to determine what was in the account. Tr. 435. Black also testified that Baker made a telephone call to his bank to verify his line of credit during their March 1988 meeting. Tr. 441.

> Baker, on the other hand, testified that he did not pull anything from a drawer and he did not show Black a document. Tr. 619. He also said that he did not telephone the bank during any of their meetings or discussions. Tr. 621. Baker explained that he simply told Black that he could handle it; he represented during the hearing that his word was good. Tr. 621. However, Baker said that that did not mean that he could not change his mind about lending Black money. Tr. 632.

Based on these findings, the ALJ concluded (I.D. para. 48) that:

> Both Black and Baker agree that Black never saw a balance sheet or financial statement for Baker. And Baker concedes he did nothing to assess his net liquid assets. Black claims that Baker showed him and described to him a statement from his Merrill Lynch account and that Baker made a telephone call to his bank to verify his line of credit when they met in 1988 to discuss the loan. Baker denies that he showed and described to Black his Merrill Lynch statement or that he called his bank about his line of credit. Baker maintains that he simply told Black that he could handle the loan. Black's testimony about what Baker did to verify his ability to lend Black all the money he needed is not supported by Baker's testimony or any corroborating evidence. The record shows that Black had no objective evidence to support his assumption that Baker had the necessary net liquid assets.

5. Black now argues that the ALJ erred in holding that he "is not financially qualified because, at the time of certification, the lender Baker, did not verify his net liquid assets . . . and did not adequately document to Black that sufficient funds were on hand." (Br. p. 3). Relying on the Commission's decision in *Northampton Media Associates*, 4 FCC Rcd 5517, 5518 para. 9 (1989) and 5 FCC Rcd 3075 para. 3 (1990), Black submits that Commission policy does not require "contemporaneous documentation" for an applicant to establish his financial qualifications.

6. Black's argument is factually and legally flawed. First, the ALJ did not find Black financially unqualified for failing to produce contemporaneous documentation. Rather, his holding rested on Black's failure to produce "credible evidence" that "when Black certified, he knew that Baker could provide the money he relied on . . ." I.D. para. 52. The findings and conclusions quoted above support the ALJ's holding on this point. And several recent Commission decisions reiterate that *Northampton*, *supra*, requires that:

> . . . the applicant must demonstrate that it has taken the necessary steps to ascertain that the lender, when not a financial institution, has sufficient financial resources to meet his loan commitment at the time of certification, and that reliance on the self-serving statement of the individual responsible for the certification that he took the appropriate steps to secure the needed funds would not be sufficient to demonstrate that it met its burden in this respect.

See Aspen FM, Inc., *supra*, 6 FCC Rcd at 1603 para. 8, and *Texas Communications*, *supra*, 7 FCC Rcd at 3187 para. 7. Thus, firm Commission precedent supports the ALJ's conclusion. Additionally, the ALJ found a second and independent basis for holding that Black was not financially qualified.

7. An applicant must also demonstrate that prior to certification he has determined what his costs will be "to construct the proposed station and operate it without revenue for three months." *A. P. Walter, Jr.*, 6 FCC Rcd 875, 877 para. 10 (Rev. Bd. 1991). Here, the ALJ held that Black failed "to demonstrate that he determined how much it would cost to build and operate the proposed station before he certified." I.D. para. 50. His holding rested on specific findings, I.D. paras. 8-13, 50-51, including the finding, *id.* paras. 8-9, that:

> Black produced a typed document at his deposition which is an estimate of his construction costs and first quarter operating costs. The typewritten assessment was prepared from handwritten notes a few days before his deposition. Tr. 443.
>
> * * *
>
> Black maintains that he had his estimated construction and operation costs on pieces of paper but they were destroyed shortly before the hearing, in the summer of 1990. Tr. 445.
>
> * * *
>
> He maintained that he was totally ignorant of his need to produce his estimates in response to a document request made on June 19, 1990. Tr. 446. He said that he had read the request for documents. Tr. 448.

8. Black's Exceptions (Br. p. 5) now claim that the finding regarding his failure to determine cost estimates prior to certification "is based on the erroneous factual premise that Black claimed that he had written cost estimates at the time of certification, which were later destroyed. However, Black did not make this claim. His testimony was that he had *oral estimates*. Prior to document production he prepared written estimates based on his March 1988 *oral estimates*." (Emphasis added) In support of this argument, Black cites testimony at Tr. 443-446.

9. Our review of the record confirms the accuracy of the ALJ's findings. *See also* Troy's Reply, pp. 18-19. Black *did* testify that he prepared his written list of costs "from the bits of information that I had to comprise the first quarter operating costs of construction I had different pieces of paper." Tr. 445. Black later testified even more specifically that: ". . . the notes, the little pieces of paper that I'd had from all along back in 1988, I threw those away, the garbage was taken out, and it was gone." Tr. 446. Thus, we find no persuasive factual basis for upsetting the ALJ's conclusion that "Black's response to whether he determined his costs before he certified lacks credibility." I.D., para. 50.

10. In sum, the ALJ's crucial conclusions regarding Black's financial qualifications were not based on the mere failure to produce contemporaneous financial documents. Rather the I.D. relied on the applicant's failure to present objective, credible or corroborating evidence that when Black certified, (a) "he knew that Baker could provide the money he [Black] relied on; and, that (b) Black "had determined how much money he would need." I.D., para. 52. Since the burden of proof to establish his basic financial qualifications was upon Black, (*see Aspen FM*, *supra*, 6 FCC at 1603 para. 9, citing 47 USC 308(b), and *Midwest Radio -Television, Inc.*, 24 FCC 2d 625, 626 para. 4 (1970)), we affirm the ALJ's conclusion that Black is not financially qualified because he failed to produce substantial evidence regarding two of the Commission's basic financial requirements, *see Northampton*, *Aspen FM*, and *Texas Communications*, *supra*. Black is therefore not entitled to further comparative consideration. *Guinan v. FCC*, 297 F.2d 782 (D.C. Cir. 1961).

11. **SUNBELT'S INTEGRATION CREDIT:** Sunbelt, a limited partnership, has three partners who each hold equal equity shares. Osbern Henley is the general partner, and R. E. Shelley and John B. Crawley are the limited partners. I.D. para. 21. Sunbelt's limited partnership agreement was belatedly drafted by communications counsel and Crawley. The managing partner, Henley, "never discussed the agreement in detail with anyone". I.D. para. 24. Nor has the managing partner been in control of partnership finances. *Id.* Nevertheless, the ALJ held that "the activities of Sunbelt's limited partners in forwarding its proposal do not support a basis for projecting that Osbern Henley will not control and operate the proposed station." I.D. paras. 58-59. Sunbelt and Troy were both awarded 100% integration credit, but Troy was selected as the superior comparative applicant because (I.D. para. 62):

> Troy has shown a greater likelihood of knowledge of and interest in the service area because of the longtime residence and association its principals have had with the service area and their participation in civic activities. Troy also has greater broadcast experience than Sunbelt.

12. Troy argues that Sunbelt's credit for integration should have been entirely eliminated because of the active participation of the limited partners in the organization of Sunbelt and the preparation and prosecution of its application. Br. 8-12, 21-25. Our review of Sunbelt's partnership agreement, in light of the parties' arguments, reveals a narrower and more concrete basis for decisionally reducing Sunbelt's credit to 33%. *See Eugene Walton*, 7 FCC Rcd 3237, 3238 at para. 7 (1992), and *Marlin Broadcasting of Central Florida v. FCC*, 952 F.2d 507, 514 (D.C. Cir. 1992).

13. On June 23, 1988, Sunbelt amended its application, FCC Form 301 (Oct. 1986), substituting a limited partnership for its previous corporation. I.D. paras. 21-22. Sunbelt's partnership agreement did not include the Commission's removal provision which:

> (5) prohibits any exempt limited partner from voting on the removal of a general partner or limits this right to situations where the general partner is subject to bankruptcy proceedings, as described in Sections 402(4)-(5) of the Revised Uniform Limited Partnership Act, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause, as determined by an independent party[.]

See FCC Form 301 Instructions, page 3 (Oct. 1986). Given the precedent discussed by the Commission in *Eugene Walton*, *supra*, 7 FCC Rcd at 3238 para. 7, we cannot overlook the fact that Sunbelt's limited partnership was "fatally flawed from the time of its execution because it did not prohibit" the limited partners from determining the competence of the managing partner "instead of placing responsibility for such a determination with a court of competent jurisdiction." *See also Ownership Attribution*, 58 RR 2d 604, 619-620 (1985). Following the Commission's recent decision in *Walton*, *supra*, we attribute the limited partners' 66% equity interest for integration purposes, and Sunbelt is thus entitled to credit for the integration of only Henley's 33% equity interest. This determination further buttresses the ALJ's finding that Troy is the superior comparative applicant. Thus, other arguments in the exceptions are not decisional or were correctly resolved in the ALJ's I.D. and related rulings.

14. **ABUSE OF PROCESS:** After the ALJ released his I.D., Black, on December 2, 1991, filed a Motion to Reopen the Record and to Enlarge Issues against Troy. An abuse of process issue was sought pursuant to *WIOO, Inc.*, 28 RR 2d 685, 689 para. 6 (Rev. Bd. 1973). Black's affidavit in support of the requested issue only stated that:

> I commenced employment at Troy Broadcasting Corporation, dba radio station WTBF, as afternoon drive-time announcer (3pm-6pm) in 1985. This employment was continuous until November 15, 1991 when I was terminated by station manager Asa Dudley. No reason was given for this termination.

Without any other factual support, Black's counsel speculated that Troy's "motive in terminating Black is transparent. It is retaliating against him for continuing to prosecute his application." Motion, p. 2. In support of its opposition, Troy submits the Declaration of Asa Dudley who declared under penalty of perjury that:

> Subsequent to the issuance of the Judge's decision, [Troy's] principals (Joe Gilchrist, Jim Roling and me) reviewed with communications counsel the adverse findings and conclusions which Judge Kuhlmann rendered concerning Mr. Black's character. Counsel pointed out that the Judge had concluded that Mr. Black had not prosecuted his Brundidge application in good faith, had given deceptive and inconsistent testimony and had lied and submitted a false document to the Commission. Counsel expressed serious reservations about the appropriateness of continuing to employ a person who the Judge had concluded was not qualified to be a Commission licensee and recommended that Mr. Black's employment be terminated.
>
> Under these circumstances and based upon the advice of communications counsel, [Troy's] principals concluded that it would not be in the best interests of the company to continue to employ Mr. Black. On November 15, 1991, I advised Mr. Black that for

> business and economic considerations it was not in the best interests of the company to continue to employ him. Mr. Black did not ask for details and, based upon the advice of local counsel, I did not elaborate on the basis for his termination. [Troy] did not terminate Mr. Black because he appealed the denial of his application to the Review Board.

15. In *WIOO*, *supra*, 29 RR 2d at 689 para. 6, we held that: "[a]ny attempt by a competing applicant to subvert or obstruct the prosecution of another application deprives the Commission of a real and meaningful choice between competing applicants, [and] severely abuses the Commission's comparative hearing process . . ." Here, Black has failed to support his counsel's speculation with the type of substantial and material questions of fact required by 47 USC 309(d) and 47 CFR § 1.229(d). Black's own affidavit establishes that he was continuously employed by Troy from the time he filed his application in March of 1988 until after the ALJ adopted his I.D. finding little merit in Black's application. Moreover, Troy has explained in some detail why it terminated Black's employment. Black has simply not made the specific showing required by *WIOO* before a hearing is in order. We, therefore, deny his motion to reopen the record. *See also Great Lakes Broadcasting, Inc.*, 6 FCC Rcd 4331, 4332 para. 9 (1991).

16. **SUMMATION** : Black, an unqualified applicant, is not entitled to comparative consideration. *See* para. 10 above. Troy has received credit for 100% integration and greater credit for local residence/civic activities and broadcast experience. *See* paras. 11, 13 above. We, therefore, affirm the ALJ's conclusion that a grant of Troy's application will serve the public interest.

17. ACCORDINGLY, IT IS ORDERED, That Robert W. Black, Jr.'s Motion to reopen the record and enlarge the issues filed December 2, 1991 IS DENIED; his Motions to reopen the record filed February 3, 1992, and April 10, 1992 ARE DISMISSED as moot; his petitions for leave to amend filed December 3, and 31, 1991, and February 14, and March 12, 1992, ARE GRANTED and the amendments ARE ACCEPTED;

18. IT IS FURTHER ORDERED, That the Motion to strike filed December 6, 1991 by Troy Broadcasting Corporation IS DISMISSED as moot;

19. IT IS FURTHER ORDERED, That the applications of Sunbelt Limited Partnership (File No. BPH-880308ME) and Ralph W. Black, Jr. (File No. BPH-880310MT) ARE DENIED; and,

20. IT IS FURTHER ORDERED, That the application of Troy Broadcasting Corporation (File No. BPH-880310MJ) IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

*U.S. Government Printing Office: 1992 — 312-024/60022